NO. 89-5120

(9)

In The

Supreme Court of the United States

October Term, 1989

MICHAEL OWEN PERRY,

Petitioner

v.

STATE OF LOUISIANA,

Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF LOUISIANA

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE COALITION FOR THE FUNDAMENTAL RIGHTS AND EQUALITY OF EX-PATIENTS IN SUPPORT OF PETITIONER AND FOR REVERSAL OF THE JUDGMENT BELOW

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The Coalition for the Fundamental Rights and Equality of Ex-Patients (herewithin "Coalition for the FREE" or the "Coalition") respectfully submits this motion to request permission to file its proposed brief *amicus curiae* in support of petitioner and for reversal of the judgment below in this case.

Consent to the filing of this brief has been requested from counsel for both petitioner and respondent, but has not yet been received. Therefore, this motion is being filed in lieu of any such consents.

The Coalition for the FREE seeks this Court's permission to file its brief *amicus curiae* in this case because of the particular interest and experience of its members in the various issues involved in this case. The organizational members of the Coal-

ition for the FREE[1] are all groups whose primary interest and activities concern the promotion of public understanding of mental health issues and the protection of the rights of the mentally ill and of present and former mental patients. Individual members and clients of these organizations include many present and former patients, their families and friends, as well as advocates for people with mental illness.

During the past decade, the Coalition and/or its individual members have filed or proposed to file briefs *amicus curiae* in cases involving issues similar to those in this case in this Court and in leading state courts throughout the United States.[2]

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[1] The participants in the Coalition for the FREE in this case are as follows: the National Mental Health Association; the New Jersey Department of the Public Advocate, Pennsylvania Protection and Advocacy, Inc.; the Mental Health Consumers' National Legal Defense and Education Project; the Mental Health Patients' Association of New Jersey and the Mental Patients Association of Philadelphia (a more complete description of each of the members of the Coalition is included on page 1 of the proposed brief *amicus curiae* attached hereto).

[2] *See, e.g.* the briefs of the Coalition in *United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galioto*, U.S. , 106 S. Ct. 2683, (1986), *Colorado v. Connelly*, U.S. , 107 S. Ct. 515 (1986) and *Washington v. Harper*, U.S. , 110 S.Ct. 1028 (1990). See also the Brief of the Office of the Capital Collateral Representative, et. al. as *amicus curiae* in *Ford v. Wainwright*, 472 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 355 (1986) and the proposed brief *amicus curiae* in *Satterwhite v. Texas*, U.S. , 108 S. Ct. 1792 (1988). See, also the brief *amicus curiae* of the New Jersey Department of the Public Advocate, Division of Mental Health Advocacy in *Harper*, 110 S. Ct. at p. 1052, n. 22. The Coalition has also filed or participated in *amici* briefs in state court cases across the United States involving the "right to refuse" forced drugging: *Riese v. St. Mary's Hospital and Medical Center*, 196 Cal. App. 3d 1388, 243 Cal. Rptr. 241 (1987), *Jones v. Gerhardstein*, 141 Wis. 2d 710, 416 N.W. 2d 883, (1987) and *Application of Anonymous* ("Billie Boggs"), N.Y. Court of Appeals, No. 95565/87.

In this case, the Court will hear arguments on a wide range of issues on which the Coalition is knowledgeable including the issues of access to the assistance of counsel regarding psychiatric interviews and hospital reports, the right to refuse psychotropic drugging and the standards for determining competency to be executed. Many of the members of the Coalition -- and/or clients of the Coalition members -- have themselves been involved in court proceedings which emphasized these or other closely related questions. Whatever this Court decides here will undoubtedly affect the outcome of similar cases in the future. Therefore, the Coalition members now wish to share their specialized knowledge and insights with the Court and the parties in this case.

The Coalition believes that no other party or *amicus* in this case will make available to the Court the consumer oriented arguments set forth in its Brief regarding the issues of right to the assistance of counsel, the right to refuse and the competency standards for execution, as well as current research and commentary on these issues. Because of their demonstrated concern and historic involvement in similar proceedings, the Coalition believes that it has a clear interest in these matters and can offer a significant alternative viewpoint on these issues to this Court. It therefore respectfully submits this proposed Brief *amicus curiae*.

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QUESTIONS PRESENTED

(1) Do the Eighth and Fourteenth Amemdments prohibit state from forcibly injecting insane death row inmate with mind-altering drugs when such drugs are not used for treatment but are administered solely in attempt to make him competent to be executed?

(2) Is it unconstitutionally cruel and unusual punishment to circumvent prohibition of *Ford v. Wainwright*, 477 U.S. 399, 54 LW 4799 (1986), against executing insane person by forcibly injecting insane inmate with mind-altering drugs in attempt to make him sane, particularly when court's order imposes no limits whatsoever on these injections?

(3) What standard applies to determine whether Louisiana inmate is competent to be executed?

(4) Do that standard, Eighth Amendment and *Ford v. Wainwright* prohibit execution of person who has been unanimously diagnosed as suffering from major psychotic illness, whose sanity, even on medication, varies from moment to moment and who varies "like moving target" in his appreciation for crime for which he has been convicted and punishment that he has been condemned to suffer?

(5) Is Fourteenth Amendment violated when trial court receives ex parte communications from state department of corrections and then relies upon them in reaching its decision to order forcible injections, without giving defense notice or opportunity to be heard?

(6) Is it denial of right to counsel for court to have inmate interviewed without counsel being notified or being allowed to be present?

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is being filed in support of petitioner and his right to notice, confrontation and counsel with regard to hospital reports on his competency, his "right to refuse" unwanted and potentially dangerous psychotropic drugs and his right not to be executed, while his sanity varies "like a moving target."

***Amicus curiae*, the organizational members of the Coalition for the Fundamental Rights and Equality of Ex-Patients[1] (herein-after "The Coalition for the FREE") are all groups whose primary interests and activities concern the promotion of public understanding of mental health issues and the protection of the rights of persons with mental illness and of present and former mental patients.**

[1] The participants in the Coalition for the FREE are as follows:

NATIONAL MENTAL HEALTH ASSOCIATION

The National Mental Health Association ("NMHA") is the nation's oldest and largest non-governmental, citizens' voluntary organization concerned with mental illnesses and mental health. Founded in 1909 by Clifford Beers, a man who suffered from a serious mental illness, the Association has historically led efforts on behalf of mentally ill people in institutions and the community. The NMHA has grown into a network of 650 chapters and state divisions working across the United States. It is composed of volunteers who are mostly non-mental health professionals. Some are family members whose loved ones have been affected by mental illness; others are former patients. All are committed to advocacy for the improved care and treatment of mentally ill people, the promotion of mental health and the prevention of mental illnesses.

PENNSYLVANIA PROTECTION AND ADVOCACY, INC.

Pennsylvania Protection and Advocacy, Inc. ("PPA") is the federally mandated protection and advocacy agency in Pennsylvania for persons diagnosed as mentally ill pursuant to 42 *U.S.C.A.* 10801 *et. seq.* PPA has been *amici* in numerous cases before this and other courts including most recently *Zebley v. Sullivan*, U.S. , 110 S. Ct. 885 (1990).

NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF MENTAL HEALTH ADVOCACY

The New Jersey Department of the Public Advocate (NJPA), through its Division of Mental Health Advocacy (DMHA), is a cabinet-level state agency that has represented psychiatric patients for 15 years in a wide range of matters including civil commitment, civil commitment of prisoners and medication refusal, pursuant to enabling legislation, *N.J.S.A.* 52:27E-21 through 27. In addition, the New Jersey Public Advocate is the federal Protection

Members and clients of these organizations include many present and former patients, their families and friends, as well as other advocates for persons with mental illness. The Coalition for the FREE and its organizational members have appeared as *amicus* before the courts in numerous cases related to the issues

and Advocacy Agency for Individuals with Mental Illness under 42 *U.S.C.A.* 10801 *et. seq.* In civil commitment cases alone, the Division of Mental Health Advocacy has represented individuals at more than 95, 167 hearings since its inception. Ten years ago, the New Jersey Public Advocate, Division of Mental Health Advocacy, represented the plaintiff class in *Rennie v. Klein*, 462 *F. Supp.* 1131 (D.N.J. 1978), 476 *F. Supp.* 1294 (D.N.J. 1979), modified and rem'd 653 *F. 2d* 836 (3d. Cir. 1981) (*en banc*), vacated and rem'd 458 *U.S.* 1119, 102 *S. Ct.* 3506 (1982) on remand 720 *F. 2d* 266 (3d Cir. 1983) (*en banc*) which was one of the first cases in the United States to determine the right of psychiatric patients to refuse psychotropic medication. In addition, the DMHA has filed numerous *amici* briefs in cases before this and other courts on issues related to patients rights and mental health advocacy. See, *e.g.*, brief *amicus curiae* in *Ake v. Oklahoma*, 470 U.S. 68 (1985) and the proposed brief *amicus curiae* in *Mills v. Rogers*, 457 U.S. 291 (1982).

THE MENTAL HEALTH CONSUMERS' NATIONAL LEGAL DEFENSE AND EDUCATION PROJECT

The Mental Health Consumers' National Legal Defense and Education Project was organized by consumers in Philadelphia, Pennsylvania in 1988 to provide technical assistance, research and training to mental health consumers and their advocates on legal and policy issues involving mental illness and consumers' rights and to assist consumers with access to the courts, legislatures and agencies on matters affecting their lives as consumers of mental health services.

THE MENTAL PATIENTS' ASSOCIATION OF NEW JERSEY

The Mental Health Patients' Association of New Jersey was established in May, 1984 in Asbury Park, New Jersey and is a statewide network of individuals and self-help organizations devoted to the development of self-help and advocacy groups and the protection of the interests and rights of mental health consumers.

THE MENTAL PATIENTS' ASSOCIATION OF PHILADELPHIA

The Association was formed in Philadelphia in 1985 in an effort to organize mental health consumers to oppose all efforts to erode the rights and freedoms of those who have been hospitalized for psychiatric illness and to call for an end to discrimination against the psychiatrically disabled in any form.

contrary to the "dignity of man" or outside "the limits of civilized standards." *Trop*, 356 U.S. at 100. Thus, unless the Eighth Amendment is turned on its head, it cannot be construed as prohibiting appropriate and beneficial psychiatric treatment.

Despite the recognized benefits to Perry of neuroleptic medication, Perry seems to argue that nonconsensual administration of such medication constitutes cruel and unusual punishment because the State's purpose is to induce competency for execution. That argument is without merit. Medication of Perry is, of course, intended to render him competent for execution. In fact, *every* aspect of Perry's confinement contemplates, and is intended to facilitate, Perry's eventual execution. Perry's confinement itself is a precursor to execution of the death penalty. Yet his mere imprisonment is certainly not cruel and unusual punishment. Because capital punishment is an acceptable penalty under the Eighth Amendment, the State must be allowed to employ the means necessary to carry out the death penalty unless those means are themselves cruel and unusual. In short, treatment of a prisoner which is not otherwise violative of the Eighth Amendment does not become cruel and unusual punishment merely because it facilitates execution.

In this case, involuntary treatment is not only permitted by the Eighth Amendment, but it is mandated by the Amendment. This Court held in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), that "deliberate indifference to serious medical needs of prisoners" constitutes cruel and unusual punishment. Hence, the Eighth Amendment creates a State duty to provide prisoners with medical treatment. In compliance with that duty, the State has been treating Perry with psychotropic drugs since his conviction. Now, at the instructions of his lawyers, Perry refuses to accept prescribed medication. Nevertheless, the State cannot ignore its duty to care for Perry's medical needs. Because Perry loses touch with reality when he goes without his medication, he cannot be considered competent to make his own treatment decisions. Indeed, Perry's counsel conceded as much when he moved for appointment as Perry's decision-maker: "the decision making processes of the defendant are so impaired as to render them completely unreliable." (R. 187). Thus, notwithstanding Perry's refusal of medication, the State, as Perry's custodian, must ensure that he receives proper psychiatric treatment.

To honor Perry's objections and allow him to languish in a continual state of psychosis, tortured by hallucinations, delusions and paranoid fantasies, would unquestionably constitute cruel and unusual punishment. *See* Brief for the American Psychiatric Association *et al.* at 20.

B. There is no national consensus against involuntary medication of capital offenders to achieve competency for execution.

Even assuming for the sake of argument that beneficial medical treatment could constitute cruel and unusual punishment under some circumstances, the Eighth Amendment does not forbid prescribed medication of death row inmates which produces competency for execution. Perry insists that there is a national consensus opposing such medication. However, medication which induces competency for execution is entirely consistent with contemporary American standards regarding treatment of mentally ill prisoners.

This Court has held that the Eighth Amendment ban on cruel and unusual punishment is not limited to those penalties forbidden at the time the Bill of Rights was adopted.[14] *Ford*, 477 U.S. at 406; *Gregg*, 428 U.S. at 171 (joint opinion of Stewart, Powell and Stevens, JJ.). Rather, the Eighth Amendment proscription extends to punishments which are contrary to "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. Thus, where there is a national consensus against a particular punishment, this Court will find imposition of that punishment to be cruel and unusual in violation of the Eighth Amendment. *Stanford v. Kentucky*, ___ U.S. ___, 109 S.Ct. 2969 (1989); *Penry*, ___ U.S. ___, 109 S.Ct. 2934. In determining whether a national consensus exists, this Court looks to "objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173 (joint opinion of Stewart, Powell and Stevens, JJ.). In particular, the Court considers legislation

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[14]Perry does not argue that involuntary medication to restore sanity for execution was prohibited at common law. Nor could he. Antipsychotic drugs were not available as a treatment for mental illness until this century. Kessler & Waletzky, *supra*, note 8, at 202; Haddox & Pollack, *Psychopharmaceutical Restoration to Present Sanity (Mental Competency to Stand Trial)*, 17 J. Forensic Sci. 568, 570-71 (1972).

to be "the primary and most reliable indication of consensus." *Stanford*, ____ U.S. at ____, 109 S.Ct. at 2977.

A review of state legislation reveals no "objective evidence . . . of an emerging national consensus," *Penry*, ____ U.S. at ____, 109 S.Ct. at 2955, against medication of death row inmates to produce competency for execution. *No* jurisdiction explicitly prohibits such medication. On the other hand, contrary to Perry's allegation that "[n]o state has passed legislation authorizing the use of medication to establish competency for execution," Brief for Petitioner at 40 (emphasis omitted), Maryland expressly allows medication of condemned prisoners to restore competency. *See* Appendix E. Moreover, of the 37 states which have enacted capital punishment, 24 (including Maryland) contemplate the use of medication to produce competency by specifically authorizing treatment of incompetent death row inmates or by providing that the execution of such inmates will be stayed or suspended ***until competency is regained.***[15] *See* Appendix F. The statutes of the remaining 13 death penalty states, including Louisiana, are silent on the issue of restoration of competency. However, these 13 states, as well as the 13 states and the District of Columbia which do not allow capital punishment, authorize involuntary treatment of prisoners and criminal defendants in other contexts.[16] *See* Appendixes H and I. Thus, involuntary medication of prisoners is not, in and of itself, contrary to contemporary values.[17] Moreover, at least twenty states statutorily provide that competency to stand trial may be achieved with medication. *See* Appendix J.

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[15]In addition, three other states had similar provisions before outlawing capital punishment. *See* Appendix G.

[16]As evidence of a national consensus against involuntary medication of prisoners, Perry points this Court to a host of state statutes regarding the rights of civilly committed patients. Appendix to Brief for Petitioner, Chart 2. However, because prisoners do not necessarily possess the same rights enjoyed by those who have not been convicted of crimes, statutes governing treatment of civilly committed patients are for the most part irrelevant to the issue of contemporary standards regarding treatment of prisoners.

[17]Indeed, 20 states authorize capital punishment by lethal injection. U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1988*, 5, Table 2 (1989).

Recently, in *Stanford v. Kentucky*, ____ U.S. ____, ____, 109 S.Ct. 2969, 2975-76 (1989), this Court held that a showing that 15 states forbid the execution of 16-year-old offenders and that 12 states forbid the execution of 17-year-old offenders did "not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." Thus, in claiming that involuntary medication of prisoners to achieve competency for execution is prohibited by the Eighth Amendment, it is Perry's "'heavy burden' . . . to establish a national consensus *against* it." *Id.* at ____, 109 S.Ct. at 2977 (citation omitted). As the above survey of state legislation demonstrates, Perry has failed to carry that burden. Not a single state has enacted legislation forbidding medication of prisoners to restore competency for execution. Moreover, such medication is ***authorized*** by the only state which has specifically addressed the issue by statute. Hence, "the clearest and most reliable objective evidence of contemporary values," *Penry*, ____ U.S. at ____, 109 S.Ct. at 2953, reveals absolutely no opposition to the use of medication to achieve competency for execution, much less a national consensus against such treatment. In short, medication of condemned prisoners to produce competency is not contrary to "evolving standards of decency."[18]

C. Nonconsensual treatment of death row inmates which produces competency for execution does not violate the Eighth Amendment prohibition of excessive punishment.

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[18]Perry places great emphasis on the fact that the state court's order is not specifically authorized by state statute or by a decision of the state Supreme Court but rather is, as he phrases it, "the product of penological policy-making by a single trial judge." Brief for Petitioner at 37. That is beside the point. A particular punishment need not be explicitly sanctioned by statute or supreme court decision in order to be permissible under the Eighth Amendment. For example, in *Penry v. Lynaugh*, ____ U.S. ____, 109 S.Ct. 2934 (1989), a mentally retarded murderer was sentenced to death; the sentence was not based on an explicit state authorization of capital punishment of mentally retarded murderers. Yet this Court refused to hold that execution of mentally retarded offenders violates the Eighth Amendment. Likewise, in this case, Louisiana's failure to expressly authorize the treatment at issue does not render that treatment violative of the Eighth Amendment.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), Justices Stewart, Powell and Stevens wrote that "public perceptions of standards of decency with respect to criminal sanctions are not conclusive [of the Eighth Amendment issue]. A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' . . . This means, at least, that the punishment not be 'excessive.'" *Id.* at 173 (joint opinion of Stewart, Powell and Stevens, JJ.) (citation omitted). "Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). *See also Stanford*, ___ U.S. ___, 109 S.Ct. 2969 (O'Connor, J., concurring in part and concurring in the judgment); *id.* (Brennan, J., dissenting); *Penry*, ___ U.S. ___, 109 S.Ct. 2934 (opinion of O'Connor, J.); *id.* (Brennan, J., concurring in part and dissenting in part). As explained below, medication of incompetent death row inmates is not only consistent with this nation's "evolving standards of decency," but it survives the excessiveness inquiry suggested by *Gregg*.[19]

There are two generally accepted purposes of the death penalty: retribution and deterrence. *Enmund v. Florida*, 458 U.S. 782 (1982). "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. . . . [C]ertain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg*, 428 U.S. at 183-84 (joint opinion of Stewart, Powell and Stevens, JJ.) (footnotes omitted). In addition, the death penalty can be in some cases an effective deterrent to potential capital offenders: "[t]here are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate." *Id.* at 186 (footnotes omitted).

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[19]Perry does not expressly claim that involuntary medication to achieve competency for execution violates the Eighth Amendment proscription of excessive punishment. Nevertheless, because the basis for Perry's Eighth Amendment claim is not entirely clear, we address the excessiveness issue.

Medication of death row inmates which produces competency for execution significantly contributes to both goals of the death penalty. It is readily apparent that, if a condemned prisoner is shielded from execution by virtue of incompetency, the State cannot give effect to society's moral outrage at the prisoner's crime. Medication which restores competency and thereby allows execution of the death penalty thus satisfies the retributive goal of capital punishment. In addition, medication which induces competency enhances the deterrent effect of the death penalty by increasing the likelihood of execution. As loopholes to execution are narrowed or closed, the death penalty becomes a more certain punishment and hence a better deterrent. Thus, by limiting the effectiveness of mental illness as an escape hatch from execution, medication of incompetent death row inmates contributes to the penological goal of deterrence.

The second prong of the Eighth Amendment excessiveness inquiry requires evaluation of the proportionality of the punishment in relation to the seriousness of the offense. *See Solem v. Helm*, 463 U.S. 277 (1983). As Justices Stewart, Powell and Stevens explained in *Gregg*, "[t]here is no question that death as a punishment is unique in its severity and irrevocability." *Gregg*, 428 U.S. at 187 (joint opinion of Stewart, Powell and Stevens, JJ.). Yet capital punishment is not invariably disproportionate punishment for the crime of deliberate murder. *Id.* Assuming for the sake of argument that involuntary medication to achieve competency for execution increases the severity of a capital offender's punishment, such medication certainly does not constitute punishment that is so severe as to be disproportionate to the crime of premeditated murder, "the most extreme of crimes." *Id.* Murders which are "so grievous an affront to humanity," *id.* at 184, as to justify the ultimate penalty of death must likewise merit the relatively minor intrusion of nonconsensual medication.

In this case in particular, the "penalty" of involuntary medication is amply justified by Perry's cold-blooded murders of five members of his family. As described by the Louisiana Supreme Court, Perry's crimes were particularly egregious:

> The offense was a shocking mass murder in a small town. Five members of defendant's family were killed on a Sunday morning, two as they slept in their beds. After killing his

> parents, his cousins and a nephew, the defendant took money from his mother's belongings and from his father's pockets and fled the state in his father's car, taking refuse [sic] in a Washington hotel. He killed the adult victims in their own homes in a violent, bloody encounter which was deliberately planned. He waited for his parents more than an hour following his murder of his two cousins in a house just two doors away. A total of three weapons were used. The death penalty in such a case is proportionate to the offenses and to this particular defendant.

(J.A. 40-41). Obviously involuntary medication is not overly severe treatment for the criminal responsible for these crimes. The brutal slayings of five people, including a two-year-old child, merit the death penalty, even if carrying out that penalty requires treating Perry with medication to achieve his competency.

III. Perry has no Fourteenth Amendment right to refuse prescribed medication which will render him competent to be executed.

In addition to his Eighth Amendment argument, Perry contends that he is protected from unwanted medication by the Fourteenth Amendment. According to Perry, both the Due Process Clause and Louisiana law grant state prisoners a liberty interest in refusing antipsychotic medication. However, a sentence of death justifies restrictions on a condemned inmate's liberty which are necessary to carry out the death penalty; thus, a death row inmate who requires medication to be competent for execution is not entitled by the Fourteenth Amendment to refuse such medication. Moreover, Louisiana law does not create a constitutionally protected liberty interest in avoiding medication which is intended to produce competency for execution. Finally, even assuming that Perry has a liberty interest in refusing medication, that interest is overridden by the State's interest in effectuating the death penalty.

A. The imposition of a sentence of death extinguishes the right created by the Due Process Clause to refuse prescribed antipsychotic medication.

This Court has consistently recognized that prisoners do not retain the full range of liberty interests enjoyed by others. It is self-evident that a conviction and sentence of imprisonment necessarily extinguish the right to be free from confinement. Likewise, a

conviction and sentence of imprisonment justify restrictions on an inmate's freedom which are "ordinarily contemplated by a prison sentence." *Hewitt*, 459 U.S. at 468 . "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our prison system." *Price v. Johnston*, 334 U.S. 266, 285 (1948). Thus, this Court has held that prisoners do not enjoy constitutionally created rights to be free from administrative segregation, *Hewitt*, 459 U.S. 460, restrictions on visitation, *Thompson*, ____ U.S. ____, 109 S.Ct. 1904, interstate transfer from one prison to another, *Meachum v. Fano*, 427 U.S. 215 (1976), or transfer to an out-of-state prison, *Olim v. Wakinekona*, 461 U.S. 238 (1983). "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanye*, 427 U.S. at 242. *See also Vitek v. Jones*, 445 U.S. 480 (1980).

In *Washington v. Harper*, ____ U.S. ____, 110 S.Ct. 1028 (1990), this Court held that a Washington State prisoner had a liberty interest under the Due Process Clause of the Fourteenth Amendment in refusing medication with psychotropic drugs. The Court explicitly recognized, however, that "[t]he extent of a prisoner's right under the Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement." *Id.* at ____, 110 S.Ct. at 1037.

In this case, Perry's interest in refusing antipsychotic medication must be viewed in light of his sentence of death. Just as a sentence of imprisonment justifies conditions of confinement which are "within the sentence imposed," *Montanye*, 427 U.S. at 242, so does a sentence of death justify restrictions on liberty which are required to effectuate the death penalty. A sentence of death contemplates that the liberty interests of the condemned inmate will be restricted to the extent necessary to carry out that sentence. For example, a sentence of death by electrocution requires that the condemned prisoner be physically strapped to the electric chair; as a result, the constitutional liberty interest in freedom from bodily restraint, *see Youngberg v. Romeo*, 457 U.S. 307, 316 (1982), is superseded by imposition of the death penalty.

The State cannot carry out Perry's sentence of death unless his competence to be executed is maintained with the use of antipsychotic drugs. Treatment of Perry with such medication is thus a necessary precondition to execution of Perry's sentence and is therefore "within the sentence imposed upon him." *Montanye*, 427 U.S. at 242. In short, the *Harper* right to be free from involuntary medication was extinguished by Perry's sentence of death.

B. Louisiana has not created a constitutionally protected liberty interest in avoiding medication intended to achieve competency for execution.

As previously noted, the decisions of this Court establish that "where a statute indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." *Ford*, 477 U.S. at 428 (O'Connor, J., concurring in the result in part and dissenting in part), *quoting Hewitt v. Helms*, 459 U.S. at 471-72. Perry maintains that Louisiana law creates a constitutionally protected right to refuse psychiatric treatment intended to achieve competency for execution. Specifically, Perry asserts that La. C.Cr.P. art. 648, La. R.S. 15:830.1, and La. R.S. 28:171(P) grant him a constitutionally protected liberty interest in avoiding the medication authorized by the state court. However, none of those statutes creates such a liberty interest.

La. C.Cr.P. art. 648, which is reproduced in Appendix B, provides that, when a criminal defendant is judicially determined to be incapable of standing trial, he shall be committed "to the custody of the Department of Health and Human Resources or a private institution approved by the court for custody, care, and treatment as long as the lack of capacity continues." La. C.Cr.P. art. 648A. The statute further provides that if, after commitment, the court finds that the defendant is not likely to become capable of standing trial, the defendant shall be released on probation or, if he is a danger to himself or others, civilly committed for treatment. La. C.Cr.P. art. 648B. Although Article 648 is addressed to determinations of capacity to proceed to trial, Perry submits that the Code articles governing claims of incompetency to stand trial, including Article 648, have been applied by the Louisiana Supreme Court in the post-conviction context. However, as explained *supra* at pages 18-19, only the

procedural requirements of La. C.Cr.P. arts. 641 *et seq.* have been extended to the post-conviction setting. Thus, any *substantive* right created by Article 648 is not available to Perry. More importantly, though, Article 648 plainly does not recognize a right to refuse treatment. In fact, the Article explicitly *requires* treatment to achieve competency. So, assuming for the sake of argument that Article 648 is fully applicable to post-conviction competency proceedings, it specifically authorizes the treatment ordered in this case.

La. R.S. 28:171(P) is likewise inapplicable here. Section 171, which is reproduced in Appendix C, is a declaration of the rights of patients in state treatment facilities for the mentally ill; it simply does not apply to treatment of prisoners on death row.[20] Assuming *arguendo* that the statute applies, it does not create a right to refuse the medication at issue in this case. La. R.S. 28:171(P) provides that "[n]o medication may be administered to a patient except upon the order of a physician. . . . Medication shall not be used for nonmedical reasons such as punishment or for convenience of the staff." Perry claims that this provision prohibits any medication which is not for "treatment." However, as explained *supra* at pages 29-30, the medication authorized by the state court *is* to "treat" Perry. So, if Section 171(P) establishes treatment as a "substantive predicate" absent which medication will not be ordered, that substantive predicate has been met.[21]

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[20]La. R.S. 28:2(28)(C) specifically excludes prisons and jails from the definition of "treatment facility." *See* Appendix C. Moreover, a reading of Section 171 in its entirety makes it crystal clear that it was not intended to apply to state prisoners. The Section grants patients the rights to "unimpeded, private and uncensored communication . . . by mail, telephone and visitation," La. R.S. 28:171(C), to "be employed at a useful occupation," La. R.S. 28:171(H), and to "wear [their] own clothes," La. R.S. 28:171(G). Certainly, the legislature did not intend to grant those rights to death row inmates.

[21]The mere fact that Perry's treatment also produces competency for execution is of no consequence. Section 171(P) cannot be read as prohibiting medically necessary treatment merely because the treatment also serves another purpose. Indeed, as discussed above, La. C.Cr.P. art. 648 explicitly requires treatment to produce competency to stand trial. Thus, Louisiana law does not categorically forbid the use of medically appropriate treatment to produce competency.

Unlike Article 648 and Section 171, La. R.S. 15:830.1, reproduced in Appendix D, does apply in the prison setting. That statute provides for involuntary treatment of a mentally ill prisoner for up to fifteen days when a prison physician or psychiatrist "certifies that the treatment is necessary to prevent harm or injury to the inmate or to others." La. R.S. 15:830.1A. Section 830.1 further provides that, when treatment for more than fifteen days "is deemed necessary," judicial proceedings shall be initiated to determine whether the inmate should be committed to a treatment facility for continued treatment. *Id.* The proceedings must "be in accord with all procedures required by law in the case of judicial commitment." La. R.S. 15:830.1C. Treatment of the prisoner must continue during pendency of the proceedings. La. R.S. 15:830.1A. Following a judicial hearing at which the prisoner is represented by counsel, "the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided." *Id.*

Section 830.1 does not create a constitutionally protected liberty interest because it does not contain "explicitly mandatory language" that nonconsensual medication "will not occur absent specified substantive predicates." *Hewitt,* 459 U.S. at 472. Section 830.1 provides that involuntary medication of a prisoner "will be permitted" if such treatment "is necessary to prevent harm or injury to the inmate or to others," La. R.S. 15:830.1A, but it does not *mandate* treatment under those circumstances. Thus, the statute "stop[s] short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met." *Thompson,* ____ U.S. at ____, 109 S.Ct. at 1910 (footnote omitted). Moreover, Section 830.1 does not specify that involuntary medication is permitted *only* if necessary to prevent harm or injury. A finding that medication is necessary to prevent harm or injury is a *sufficient* condition for nonconsensual administration of neuroleptic medication, but it is not a *necessary* condition for that treatment. Perry cannot therefore "reasonably form an objective expectation" that he will not be medicated absent a finding that he poses a risk of harm or injury to himself or others. *Id.* at ____, 109 S.Ct. at 1911. In other words, even if Section 830.1 creates an expectation that an inmate *will* be medicated if necessary to prevent harm or injury, the statute does not create "a justifiable expectation on the part of the inmate that the drugs will *not*

be administered unless [that condition] exist[s]." *Harper,* ____ U.S. at ____, 110 S.Ct. at 1036 (emphasis added).[22]

C. Even assuming that a death row inmate retains a liberty interest in being free from involuntary medication, such interest is outweighed by the State's interest in enforcing a validly imposed sentence of death.

In *Turner v. Safley,* ____ U.S. ____, ____, 107 S.Ct. 2254, 2261 (1987), this Court held that a prison regulation which interferes with prisoners' constitutional rights is valid as long as "it is reasonably related to legitimate penological interests." Although the *Turner* standard of review is stated in terms of prison "regulations," this Court has noted that the standard "applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Harper,* ____ U.S. at ____, 110 S.Ct. at 1038. Thus, even assuming that Perry retains a right to refuse medication under either the Due Process Clause or Louisiana law, the court order

[22]Perry contends that Section 830.1 creates a constitutionally protected entitlement because it is "written in mandatory language." Brief for Petitioner at 42. Specifically, Perry points out the following language in Section 830.1: "If treatment for a longer period is deemed necessary, a *petition shall be filed* in a court of competent jurisdiction setting forth the reasons for the treatment. . . . After a hearing . . . , *the court shall determine* whether the inmate is competent and, if not, *he shall order* that appropriate treatment be provided." La. R.S. 15:830.1A (emphasis added). However, this language is not relevant to the issue of whether Section 830.1 creates a liberty interest in refusing medication. As explained by this Court in *Kentucky Department of Corrections v. Thompson,* ____ U.S. ____, ____ n.4, 109 S.Ct. 1904, 1910 n.4 (1989), "the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found. The search is for *relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whther [sic] an inmate may be deprived of the particular interest in question." The language relied on by Perry does not *require* that medication be ordered if an inmate poses a danger to himself or others; the quoted language comes into play only *after* an initial decision has been made to medicate the inmate for fifteen days. In addition, the quoted language does not prohibit medication under other circumstances. Thus, the language is "irrelevant mandatory language." *Id.* at ____ n.4, 109 S.Ct. at 1910-11 n.4.

authorizing nonconsensual medication to achieve Perry's competency to be executed is valid because it is reasonably related to the State's interest in carrying out the death penalty.

In *Harper,* this Court considered a constitutional challenge to a Washington prison regulation which provided for forcible treatment of mentally ill prisoners with prescribed antipsychotic drugs if the prisoners were found likely to harm themselves or others. While recognizing a constitutional liberty interest in refusing unwanted medication, the Court applied the *Turner* standard of review and upheld the regulation as reasonably related to legitimate penological interests. *Id.* In so holding, the Court considered three factors which the *Turner* decision identified as relevant to the determination of the reasonableness of a regulation:

> 'First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it.' 482 U.S., at 89 (quoting *Block v. Rutherford,* 468 U.S. 576, 586 (1984)). Second, a court must consider 'the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.' 482 U.S., at 90. Third, 'the absence of ready alternatives is evidence of the reasonableness of a prison regulation,' but this does not mean that prison officials 'have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint.' *Id.,* at 90-91; see also *Estate of Shabazz, supra,* at 350.

Id.

Consideration of the three *Turner* factors supports a conclusion that nonconsensual medication of a death row inmate to achieve competency for execution is constitutionally permissible. First, it is manifest that the State has a substantial interest in enforcing criminal sentences. *See* Brief for Petitioner at 44. The fundamental purposes of punishment, retribution and deterrence, cannot be served if criminal sentences are not carried out. In addition, as in *Harper,* the State has an interest in providing prisoners with treatment which is in their best medical interest. *Harper,* ____ U.S. at ____, 110 S.Ct. at 1039. The provision of medically prescribed treatment to a mentally ill prisoner to achieve his competency to be executed serves both of these State

interests. The medication makes it possible for the State to enforce a validly imposed death sentence. Moreover, "the fact that the medication must first be prescribed by a psychiatrist . . . ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement." *Id.* at ____, 110 S.Ct. at 1037 (footnote omitted).

Second, under the circumstances, accommodation of the right to refuse medication would impose a significant burden on the prison system. Supervision and care of untreated mentally ill prisoners is considerably more difficult than supervision and care of mentally ill prisoners who are properly treated. As explained by the American Psychiatric Association and the Washington State Psychiatric Association, "[m]aintaining a significant number of unmedicated patients may impose considerable burdens on the staff in caring for the refusing prisoner and others whose treatment programs break down. These burdens, in turn, carry unfortunate consequences for recruiting and keeping staff of a consistently high quality." Brief for the American Psychiatric Association *et al.* at 21 n.17, *Harper,* ____ U.S. ____, 110 S.Ct. 1028. In addition, prohibition of involuntary medication would make claims of incompetency more inviting by granting incompetent prisoners an absolute reprieve from execution; such an approach would likely encourage death row inmates to feign incompetency. *See Ford,* 477 U.S. at 435 (Rehnquist, J., dissenting).

Third, when an incompetent death row inmate refuses treatment, there is *no* alternative to medication which will serve the State's interest in carrying out the inmate's sentence. The right to refuse medication is thus tantamount to the power to circumvent the death penalty. In this case, the evidence is undisputed that Perry will not remain competent for execution unless he is maintained on Haldol. Consequently, without the right to treat Perry, the State cannot enforce his sentence of death.

In sum, nonconsensual medication of Perry is reasonably related to the State's legitimate penological interest in enforcing the death penalty. Such medication is also reasonably related to the State's interest in providing Perry with treatment which is in his medical interest. As a result, the medication is permissible under the Fourteenth Amendment.

IV. The state court's conduct of adversarial hearings on the issue of competency, accompanied by the full panoply of attendant procedural protections, exceeded the requirements of the Due Process Clause of the Fourteenth Amendment.

Assuming *arguendo* that he has a protected interest in refusing medication, Perry has two liberty interests which were at stake in the post-conviction proceedings: the Eighth Amendment right to avoid execution during incompetency and the right to refuse medication. Both rights hinge on the determination of competency; if Perry is competent, he may be executed, and, if Perry is incompetent, he may be treated against his will with antipsychotic medication to achieve competency. The Due Process Clause thus requires that Perry be afforded procedures adequate to ensure that the competency determination is neither arbitrary nor erroneous.

This Court's decisions in *Ford* and *Harper* are instructive as to the procedures due Perry under the Fourteenth Amendment. In *Ford*, this Court held that the Florida procedure for determining competency for execution did not provide for a full and fair hearing under 28 U.S.C. §2254. Justice Marshall's plurality opinion identified three defects in the Florida scheme: "failure to include the prisoner in the truth-seeking process," 477 U.S. at 413, "denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions," *id.* at 415, and "placement of the decision wholly within the executive branch," *id.* at 416. While Justice Marshall indicated that "a full trial on the issue of sanity" is not necessary, he stressed that "the adversary presentation of relevant information [should] be as unrestricted as possible" and that "the manner of selecting and using the experts responsible for producing that 'evidence' [should] be conducive to the formation of neutral, sound, and professional judgments." *Id.* at 416-417. In a concurring opinion, Justice Powell noted that the issue of whether the state fact-finding procedure amounted to a full and fair hearing under 28 U.S.C. §2254 was identical to the procedural due process issue. *Id.* at 424 (Powell, J., concurring in part and concurring in the judgment). Although Justice Powell did not determine "the precise limits that due process imposes in this area," he stated that "the requirements of due process are not as elaborate as Justice Marshall suggests." *Id.* at 425, 427. He

concluded that, in general, only an impartial decisionmaker and an opportunity to be heard are constitutionally required. *Id.* at 427. Justice O'Connor, concurring in the result in part and dissenting in part, reasoned that "the Due Process Clause imposes few requirements on the States in this context." *Id.* at 429 (O'Connor, J., concurring in the result in part and dissenting in part). She nevertheless found the Florida procedure invalid because it failed to provide the prisoner with an opportunity to be heard. *Id.* at 430.

In the *Harper* case, as noted above, this Court considered a due process challenge to a Washington prison regulation providing for forcible medication of mentally ill prisoners who pose a danger to themselves or others. The challenged policy allowed nonconsensual medication of an inmate only after an adversary hearing before a special committee composed of a psychologist, a psychiatrist and the associate superintendent of the treatment facility. ___ U.S. at ____, 110 S.Ct. at 1033. The policy afforded the prisoner the rights to notice, attendance at the hearing, presentation of evidence, cross-examination of witnesses, assistance of a lay advisor and judicial review. *Id.* at ____, 110 S.Ct. at 1033-34. This Court upheld the policy's procedures as adequate under the Fourteenth Amendment. *Id.* at ____, 110 S.Ct. at 1040. Specifically, the Court rejected claims that due process requires a judicial decisionmaker, right to counsel, application of the rules of evidence, or proof by "clear, cogent and convincing" evidence. *Id.* at ____, 110 S.Ct. at 1042, 1044.

The procedures used by the state court in determining Perry's competency far exceeded the requirements of the *Harper* and *Ford* decisions. The competency determination was made by a judicial decisionmaker after adversary hearings and was subjected to appellate review. Perry was allowed to recommend appointments to the sanity commission, and his recommendations were honored. (R. 19; J.A. 46). Throughout the proceedings, Perry was represented by counsel. (J.A. 45-51). He was afforded the rights to be present at the hearings (J.A. 47, 50), to testify in his behalf (J.A. 95-97), to cross-examine witnesses (*see, e.g.*, R. 722), to compel production of documents (J.A. 46), to videotape the proceedings (J.A. 47), to present evidence (J.A. 125; R. 539-40, 542-45), and to submit written memoranda and oral argument (*see, e.g.*, R. 691, 763, 766). In short, the state court conducted a full-scale competency trial; it is

inconceivable that due process requires more.

Perry nevertheless asserts that the competency proceedings were constitutionally deficient in two respects. First, he complains that the court admitted into evidence the documents submitted by the Department of Public Safety and Corrections. (J.A. 99-106). According to Perry, because the documents were submitted *ex parte* and contain hearsay, their consideration by the court amounts to a denial of due process. Second, Perry insists that his due process rights were violated because the trial court failed to comply with procedures required by Louisiana law. Both of these complaints are meritless.

In *Harper*, this Court rejected an argument that a pre-hearing meeting between the special committee and the treatment facility staff, conducted without the inmate's presence, violated due process. The Court explained that "[a]bsent evidence of resulting bias, or evidence that the actual decision is made before the hearing, allowing [the inmate] to contest the [state's] position at the hearing satisfies the requirement that the opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Harper*, ____ U.S. at ____, 110 S.Ct. at 1044 (citation omitted). Similarly, in this case, Perry cannot show that he was prejudiced by the *ex parte* submission of the challenged documents. The documents were submitted to the court in early June of 1988. (J.A. 99). By the end of that month, at the latest, Perry's counsel was aware of the Department's submission of the documents. (R. 194-97). In August of 1988, the court ordered the documents admitted into evidence. (J.A. 48). Subsequently, the court conducted two evidentiary hearings at which Perry had the opportunity to contest the evidence. Indeed, at the conclusion of the October hearing, the Court specifically offered Perry's counsel the opportunity to present evidence. (J.A. 125). Under the circumstances, Perry cannot claim that he was prejudiced, or even inconvenienced, by the short delay in notifying him of the documents' submission. Perry simply cannot now complain because he neglected to refute record evidence of which he was aware for several months.

Perry's objection to the hearsay nature of the evidence is likewise unfounded. Perry points to no authority for the proposition that the hearsay prohibition is constitutionally required in competency proceedings. Neither *Ford* nor *Harper* suggests such a

requirement. In *Harper*, this Court explicitly rejected the argument that application of the rules of evidence was constitutionally required. ____ U.S. at ____, 110 S.Ct. at 1044. In addition, the plurality opinion in *Ford* stressed that "the adversary presentation of relevant information [should] be as unrestricted as possible." 477 U.S. at 417. Certainly, Perry cannot claim that the documents in question were not relevant. Moreover, given the medical nature of the competency determination, the inmate's interests are better protected by considering "the realities of frequent and ongoing clinical observation by medical professionals," *Harper*, ____ U.S. at ____, 110 S.Ct. at 1042, than by formal adherence to the rules of evidence. In fact, Perry himself offered six volumes of hearsay medical records at the first hearing. (R. 539-40). Finally, because Perry was given an unfettered opportunity to contest the evidence, he cannot assert that he was prejudiced by its admission.

Perry's second complaint is that the state court failed to comply with procedures required by Louisiana law. However, Perry does not identify any specific deficiencies in the state court procedure. Moreover, a state's failure to follow its own procedures is not a violation of due process; "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Olim*, 461 U.S. at 250 n.12. This Court rejected an identical argument in *Olim v. Wakinekona*, 461 U.S. 238 (1983):

> Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. . . . The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

Id. at 250-51 (footnote and citations omitted). *See also Hewitt*, 459 U.S. 460. Thus, the State's compliance or noncompliance with its own procedural requirements is irrelevant to the constitutional issues before this Court.

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

RENE I. SALOMON*
Assistant Attorney General

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Assistant Attorney General

State of Louisiana
Department of Justice
P.O. Box 94095
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Counsel for Respondent

*Counsel of Record

APPENDIXES

APPENDIXES

APPENDIX A

EXCERPTS FROM RECORD

LETTER TO JUDGE HYMEL FROM KEITH B. NORDYKE

[RECORD—P. 19]

Nordyke and Denlinger
Attorneys at Law
228 Napoleon
Baton Rouge, Louisiana 70802

Keith B. Nordyke
June E. Denlinger

Telephone
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Mailing Address
P. O. Box 237
Baton Rouge, LA 70821

January 20, 1988

The Honorable L. J. Hymel, Judge
19th Judicial District Court
Parish of East Baton Rouge
222 St. Louis Street
Baton Rouge, LA 70801

Re: *State of Louisiana v. Michael Owen Perry*

Dear Judge Hymel:

You have asked the defense to submit names of persons who the defense would like to nominate to the sanity commission in the above captioned. To that end, the defense would nominate as a psychiatrist qualified to serve on the sanity commission Dr. Glen Estes, Suite 3, 4521 Jamestown Avenue, Baton Rouge, Louisiana, telephone (504) 927-3062.

As I stated in open court, Dr. Curtis Vincent, a psychologist practicing in Baton Rouge, did extensive workups on Mr. Perry while Michael was at Feliciana Forensic Facility. As the 1987 legislature amended the Code of Criminal Procedure to allow psychologists to sit on sanity commissions I think it would be appropriate for Dr. Curtis Vincent to be appointed especially in light of his familiarity with this case. I therefore nominate as the psychologist member of this panel

Dr. Curtis Vincent, 5000 Constitution Avenue, Baton Rouge, Louisiana, telephone (504) 928-6460.

Please advise if there is anything further that we can do to assist the court in this regard.

Very truly yours,

NORDYKE AND DENLINGER
/s/ Keith B. Nordyke
KEITH B. NORDYKE

• • •

EXCERPT FROM MEMORANDUM IN SUPPORT OF STATE'S MOTION TO DISQUALIFY KEITH NORDYKE AS COUNSEL OF RECORD IN THESE PROCEEDINGS AND AS "DO-GOODER" FOR MICHAEL OWEN PERRY

[RECORD—P. 91]

• • •

The State • • • did not receive from defense counsel, a copy of Mr. Nordyke's March 14, 1988 letter (attached as App. F) to the Warden of the Louisiana State Penitentiary. Mr. Nordyke's letter instructed the warden to discontinue, the administering of any and all psychotropic medication to Michael Owen Perry: including but not limited to the medication ordered by medical doctors under whose care Michael Perry was placed.

• • •

[RECORD—P. 184]

Nordyke and Denlinger
Attorneys at Law
228 Napoleon
Baton Rouge, Louisiana 70802

Keith B. Nordyke
June E. Denlinger

Telephone
(504) 383-1601
Mailing Address
P. O. Box 237
Baton Rouge, LA 70821

March 14, 1988

Warden
Angola State Penitentiary
Angola, LA 70775

Re: Michael Owen Perry
(Death Row)

Dear Warden:

* * *

Pursuant to that decision making authority that has been delegated to me, I hereby request that Michael Owen Perry be removed from any and all psychotropic medication including but not limited to Haldol and Prolixin, which may currently be administered to Mr. Perry. This medication shall not be given to Mr. Perry until such time as I specifically concur or of course, a court orders otherwise. Mr. Perry is totally incompetent and unable to make decisions on his own behalf. He is currently undergoing evaluation by numerous doctors. I deem it in Mr. Perry's best interests not to be taking medication at this point in time. I have carboned a copy of this letter to the hospital at Angola and request that same be placed clearly in Mr. Perry's chart.

* * *

[RECORD—P. 186]

* * *

EX PARTE MOTION FOR DELEGATION OF DECISION MAKING AUTHORITY

NOW INTO COURT, through undersigned counsel, comes Michael Owen Perry, an incompetent death row inmate, who respectfully suggests to the Court through his undersigned counsel the following:

1.

Undersigned counsel visited with Perry on January 6, 1988, at the hospital at Louisiana State Penitentiary. Michael was blatantly psychotic, unable to articulate any facts regarding his case cogently and was completely incapable of making decisions on his own behalf.

2.

It is anticipated during the course of the representation of Mr. Perry for purposes of the "Perry Motion" that there will be certain issues raised, such as the ability to waive the attorney client privilege, whether to abandon defenses or not, and whether or not Perry himself should be an exhibit or attempt to testify. Counsel believes Perry to be totally incapable of making these decisions for himself.

3.

On January 15, 1988, undersigned counsel contacted Mr. Tom Collins, executive counsel of the Louisiana State Bar Association, in an attempt to obtain ethical guidance and in particular, interpretation of Rule 1.14 of the Louisiana Code of Professional Responsibility. Rule 1.14 (copy attached) asserts that the attorney must "take other protective action as may appear appropriate under the circumstances" [when his client is under a disability and unable to make decisions]. Mr. Collins stated that the committee would not be able to provide an ethical opinion or guidance on this issue and that counsel should proceed under existing procedural or substantive law.

[RECORD—P. 187] 4.

Although Rule 1.14 suggests the possibility of a curator, it is clear that that portion of Rule 1.14 is dealing with civil matters. Counsel does not believe there is any authority for a curator to make decisions

in criminal cases on behalf of his client and further, does not believe that such decisions should or can be made by a curator.

5.

It is anticipated that expert psychiatric testimony in this cause will show that the decision making processes of the defendant are so impaired as to render them completely unreliable.

6.

Counsel represents to the Court that there are no close family relatives available to appoint to make decisions on behalf of Mr. Perry and further, even if such relatives were available, they would not be eligible for appointment due to the nature of the crime accused in this matter.

7.

Counsel desires to undertake to make these decisions on behalf of Mr. Perry, keeping Mr. Perry's best interests at heart at all times, in order that adequate representation might be given. Other than "a Motion to Appoint a DoGooder" counsel knows of no other method to adequately protect Mr. Perry's rights and to competently and timely exercise the decision making that must be done in this case.

8.

Movers desire that this motion be kept under seal and that any hearing held in this matter be held in chambers ex parte.

9.

Counsel certifies that they have read the appropriate rules of professional responsibility and there is no guidance other than what is attached.

10.

In the alternative, mover desires that an experienced criminal lawyer, who has practiced in the field of death penalty **[RECORD—P. 188]** defense, be appointed to make decisions on behalf of Michael Owen Perry and undersigned counsel would be happy to provide the Court with a list of such persons in the Baton Rouge area.

WHEREFORE, MOVER PRAYS that after due proceedings had, there be a hearing in chambers, ex parte, and any record thereof be kept under seal, and that Michael Owen Perry be allowed to make decisions through counsel or by a representative to be appointed from the Criminal Bar of the City of Baton Rouge who has experience in death penalty defense.

MOVER FURTHER PRAYS for a general and equitable relief as may be allowed by law.

BY ATTORNEYS:

/s/ June E. Denlinger
KEITH B. NORDYKE
JUNE E. DENLINGER
228 Napoleon
Baton Rouge, LA 70802
Phone: (504) 383-1601

* * *

LETTER TO JUDGE HYMEL FROM KEITH B. NORDYKE

[RECORD—P. 193]

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June 22, 1988

Honorable L. J. Hymel
Judge
19th Judicial District Court
222 St. Louis Street
Baton Rouge, Louisiana 70801

Re: *State of Louisiana v. Michael Owen Perry*
Number: 9-85-472

Dear Judge Hymel:

I enclose herewith an objection to additional evidence which has been attached to various state briefs in this matter. I understand Your Honor does not want this matter being set for hearing therefore, we would appreciate this objection being filed into the record so that our rights for appellate review are reserved if necessary.

Thanking you for your cooperation and attention, we remain

Very truly yours,

NORDYKE AND DENLINGER
/s/Keith B. Nordyke
KEITH B. NORDYKE

* * *

[RECORD—P. 194]

* * *

OBJECTION TO AMICUS BRIEF AND OBJECTION TO INTRODUCTION OF ADDITIONAL EVIDENCE

NOW INTO COURT, through undersigned counsel, comes Michael Owen Perry who respectfully objects to the filing of an amicus brief by the State of Louisiana and to the objection of additional evidence for reasons set forth below:

1.

Mover would object to the amicus brief filed on behalf of the State of Louisiana (Department of Corrections) for the reason that the Department of Corrections has no interest in this matter and no cognizable standing to file an amicus brief. Further, Michael Owen Perry perceives an amicus brief by ***the state*** as merely an attempt to get a "second bite of the apple". There is no showing anywhere that the Attorney General's office is not sufficiently motivated or prepared to handle this case. In other words, it seems that "the state is the state is the state" and that an additional opportunity to file a brief is being given the state by use of an amicus brief.

2.

Attached to the amicus brief and further, attached to the state's original memorandum in this matter, is evidence adduced after the trial of this matter held in April, 1988. Michael Owen Perry vigorously objects to the introduction of this evidence for numerous reasons including but not limited to the following:

1. The evidence is hearsay;

2. The evidence was not taken subject to cross examination

3. The evidence purports to be opinion testimony however no qualification of the expert has been had, and Michael Owen Perry believes that the physicians in this matter are the best experts.

4. Michael Owen Perry has been denied due process as defined in ***Ford v. Wainwright*** in that the introduction of this evidence completely denies Michael Owen Perry an opportunity to respond and to be heard.

5. Any evidence obtained from Michael Owen Perry in addition to being uncross-examined, was in violation of his right to coun-

sel in that said evidence was taken **[RECORD—P. 195]** from Michael Owen Perry while he was either incompetent or without the advice of his counsel and certainly without the knowledge of his counsel both in violation of the Fifth and Sixth Amendments to the United States Constitution.

3.

For the above and foregoing reasons and based on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the Louisiana Constitution plaintiff objects to the introduction of any additional evidence.

WHEREFORE MOVER PRAYS that all evidence filed and not connected with the trial of this matter and subsequent to the trial of this matter be stricken and not considered.

BY ATTORNEYS:

/s/ Keith B. Nordyke
KEITH B. NORDYKE
NORDYKE AND DENLINGER
P. O. Box 237
Baton Rouge, Louisiana 70821
Telephone: (504) 383-1601

• • •

[RECORD—P. 196]

• • •

OBJECTION TO INTRODUCTION OF ADDITIONAL EVIDENCE

NOW INTO COURT, through undersigned counsel, comes Michael Owen Perry who objects to the introduction of evidence subsequent to the close of the hearing for reasons set forth below:

1.

Mover understands however has not been favored with a service copy of certain evidence which has been forwarded to the trial court in this matter subsequent to the close of the hearing on April 20, 1988.

2.

In particular, mover has been made aware of a June 7, 1988 letter from Annette Viator, attorney for the Department of Corrections, to the Honorable L. J. Hymel, forwarding certain documentation from the Louisiana State Penitentiary to the trial court.

3.

Furthermore, these documents, which are not introduced into evidence, and have not been subjected to cross examination had been attached to the state's brief in this cause.

4.

The aforereferenced June 7, 1988 letter indicates that a physician at Louisiana State Penitentiary will be following up with weekly reports to Your Honor and mover would respectfully and vigorously object to this procedure as evidence has been taken in this matter and the case has been taken under advisement.

5.

This procedure completely and totally violates defendants rights in this cause as these witnesses were not called by the State of Louisiana at the hearing in this matter (when the state **[RECORD—P. 197]** had total opportunity to do so) and these documents attempting to be introduced in this fashion solely in an effort to circumvent cross examination and normal evidentiary procedure.

6.

The aforereferenced procedure is violative of Michael Owen Perry's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as all Louisiana corresponding constitutional provisions in that the documents submitted in the aforereferenced fashion have not been tested by cross examination, have not been subjected to scrutiny by counsel, have not been served upon counsel, afford no notice and opportunity to be heard and appear to be derived from Michael Owen Perry without the benefit and advice of counsel.

WHEREFORE MOVER PRAYS that after due proceedings had mover prays that the State of Louisiana be prohibited from introducing any further evidence after 20 April 1988 and further, that all such documentation submitted after 20 April 1988 be stricken from the record.

MOVER FURTHER PRAYS that the State of Louisiana be ordered and prohibited from further attempts at providing documentation to this Court without:

a. Forwarding a copy to opposing counsel.

b. Noticing a hearing and producing the witnesses and the opportunity to be heard.

BY ATTORNEYS:

/s/ Keith B. Nordyke
KEITH B. NORDYKE
NORDYKE AND DENLINGER
P. O. Box 237
Baton Rouge, Louisiana 70821
Telephone: (504) 383-1601

LETTER TO ANNETTE VIATOR FROM KEITH B. NORDYKE

[RECORD—P. 204]

Nordyke and Denlinger
Attorneys at Law
228 Napoleon
Baton Rouge, Louisiana 70802

Keith B. Nordyke
June E. Denlinger

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(504) 383-1601
Mailing Address
P. O. Box 237
Baton Rouge, LA 70821

June 22, 1988

Ms. Annette Viator
Department of Corrections
P. O. Box 943-4
Baton Rouge, Louisiana 70804

Re: Michael Owen Perry

Dear Annette:

* * *

As attorney for Michael Owen Perry I would respectfully request at this time that all medication to Michael Owen Perry be discontinued until such time as the state has complied with the statutory procedures set forth in Title 15 of the Louisiana Revised Statutes.

* * *

[RECORD—P. 305]

Supreme Court
STATE OF LOUISIANA
New Orleans

Chief Justice
John A. Dixon, Jr.

Associate Justices
Pascal F. Calogero, Jr.
Walter F. Marcus, Jr.
James L. Dennis
Jack Crozier Watson
Harry T. Lemmon
Luther F. Cole

Clerk of Court
Frans J. Labranche, Jr.

301 Loyola Ave., 70112
Telephone 504-568-5707

August 29, 1988

Hon. L. J. Hymel
Judge, 19th Judicial District Court
222 St. Louis St.
Baton Rouge, LA 70801

Re: No. 88-KD-2239
State of Louisiana vs. Michael Owen Perry

Dear Judge Hymel:

This is to advise that the Court took the following action, this date, in the above entitled matter:

"The order of the trial judge dated August 26, 1988 in the minutes of court requiring forced medication of defendant pending the hearing on September 30, 1988 is stayed pending orders of this Court."

With kindest regards, I remain,

Very truly yours,

/s/Frans J. Labranche, Jr.
FRANS J. LABRANCHE, JR.
Clerk of Court

* * *

[RECORD—P. 314]

Supreme Court
STATE OF LOUISIANA
New Orleans

Chief Justice
John A. Dixon, Jr.

Associate Justices
Pascal F. Calogero, Jr.
Walter F. Marcus, Jr.
James L. Dennis
Jack Crozier Watson
Harry T. Lemmon
Luther F. Cole

Clerk of Court
Frans J. Labranche, Jr.

301 Loyola Ave., 70112
Telephone 504-568-5707

September 23, 1988

Hon. L. J. Hymel
Judge 19th JDC
222 St. Louis Street
Baton Rouge, La. 70801

In Re: *State of Louisiana vs. Michael Owen Perry*
No. 88-KD-2239

Dear Judge Hymel:

This is to advise that the Court took the following action on September 22, 1988 with regards to the above entitled matter:

"Relator's motion to stay the September 30, 1988 hearing is denied."

With kindest regards, I remain,

Very truly yours,

/s/ Frans J. Labranche, Jr.
FRANS J. LABRANCHE, JR.
Clerk of Court

* * *

EXCERPTS FROM SANITY HEARING HELD APRIL 20, 1988

[RECORD—P. 505]

* * *

MR. NORDYKE: Dr. Jimenez, if you will please take the stand so we can get you out of here.

* * *

[RECORD—P. 509] [EXAMINATION OF DR. THERESITA JIMENEZ]

* * *

Q Dr. Jimenez, you were appointed by Judge Hymel to examine Mr. Michael Owen Perry, were you not?

A Yes, sir.

Q And, of course, you're familiar with Mr. Perry because you were, I believe, his treating physician in the Feliciana Forensic in '83 and '84?

A That's right, sir.

Q And I believe you were also the medical director or the psychiatric director of Feliciana Forensic during those years, were you not?

A Yes, sir.

Q Okay. And on February 4th of 1988 I believe you went to Louisiana State Penitentiary at Angola and evaluated Mr. Perry, is that correct?

A Yes, sir.

* * *

[RECORD—P. 511] I feel that Mr. Perry will become competent with the proper medication adjustment. He does understand that he is convicted and also expressed that he does not want to die.

Q What facts went into that opinion, doctor?

A When I went to see Mr. Perry that day he was fairly cooperative but he was evasive with the type of answers and mood that he was in. He indicated at the first part of the interview that he didn't kill the people that were killed, that somebody else did it. At a later part of the

interview he accepted that he did it because he had a lot of anger towards his mother. So the information he was giving at that point was rather inconsistent. He also talked about his lawyer had not defended him very well because he was a member of the Mafia. And he was very inconsistent with information that he was giving. He was—I also felt at that time that if we could readjust the medication that we would be able to get him much better.

Q I believe you've diagnosed Mr. Perry as having Schizoaffective Disorder, is that correct?

A That's correct, sir.

Q Would you please tell the judge what Schizoaffective Disorder is and what the symptoms of Schizoaffective Disorder may be, including the bipolar nature and that sort of thing?

A Schizoaffective Disorder is an illness wherein the patient has a problem with thinking disorder and at the same time also a problem with his feeling tone or the defective [sic] component. When they are in the state of acute illness they **[RECORD—P. 512]** usually are very manic if they are in a manic phase and very paranoid. Now if they are also in the depressed state they could be very withdrawn and would manifesting symptoms like not wanting to sleep, not wanting to talk or having crying adversity. The problem is also that they would have some distortion in their thinking and that would be the Schizophrenic component of the illness.

* * *

[RECORD—P. 513] Q Dr. Jimenez, my first interest is you have previously, have you not, diagnosed Michael Perry as being Schizoaffective Disorder?

A Yes, sir, I did.

Q And do you classify that as a major mental illness?

A Yes, sir.

Q Okay. And can that be acute at times and disappear and fade out at other times?

A The symptoms would get better at some point but the illness would be there. It has to be controlled by medication.

* * *

[RECORD—P. 514] Q All right. Now you mentioned that this is a thinking disorder. Can you give me some examples of how this thinking disorder would affect any one of us? I mean how would it make our lives different having a thinking disorder labeled as you have Schizoeffective Disorder?

A Well, if you have problems with thinking disorder there are times wherein you would not be in touch with reality when you are acutely ill, and there are times when you would feel like people are out to get you or people are out against you. And that would be the paranoid component of the illness. And . . .

Q And if—go ahead.

A Sometimes you would think that you are somebody that you really are not. And that's like when you think you are God.

Q Okay. Now if you think people are out to get you when they're not is there a label that psychiatrists attach to that phenomena?

A Paranoia.

Q And do you conclude that paranoia is an element of a Schizoaffective Disorder?

A It's a part of the problem but some people can also be paranoid without being Schizophrenic.

* * *

[RECORD—P. 515] A * * * Sometimes, also, he rambles. His thinking is not cohesive. He would go from one topic to the other and there is very loose association.

Q Did you say good or bad association or disassociation?

A Loose, loose.

Q Loose associations. And how do you determine a loose association?

A A loose association, uh, you would note when you are talking to a person and the answers that they give you are—or when they give you information there is no cohesiveness or they just don't stick together.

* * *

[RECORD—P. 518] BY THE COURT:

Q Dr. Jimenez, while you're looking for that, when you examined him on February 4th of this year at my request do you know whether or not Mr. Perry was on medication then?

A Yes, sir, he was on medication, a small amount of medication, but he was not taking it regularly.

Q What type of medication and what dosages?

A Haldol, and I think he was taking ten milligrams of Haldol.

Q Is that a daily prescription?

A Yes, sir, he had often times refused it. In fact, at that time that I saw him I think he was just restarted or he had just started agreeing to take the medicine.

Q What kind of drug is Haldol and what is its purpose and what does it do and what affect, in your opinion, did it [RECORD—P. 519] have and does it have on Michael Owen Perry?

A It's a psychotropic medication. It's supposed to get the thinking process more delusiveness, more cohesive, less paranoia, and get him to be able to concentrate and participate in the interviews, make him less paranoid. It's supposed to help his illness get better. That's the purpose of keeping him on the medication. At one time he was also tried on Lithium Carbonate but he did not do too well and he developed too many side effects so that was discontinued.

* * *

Q Do you know of your own knowledge or have you reviewed the report showing when he was placed on the Haldol?

A I was the one who started that on him back when he—when he first arrived he was doing well. And at that time I didn't feel that he was having any mental illness because he was really—other than being hostile and uncooperative [RECORD—P. 520] at that time. We did not then put him on any medication, really just tried to observe him and referred him for some testing which was done. And then his behavior became worse and he was very hard to deal with and he was causing a lot of—making a lot of threats so he was started on medication. He did better after that but then we had problems also with the side effects so we pretty much had to readjust his medicine regularly and watch him closely. He also has a problem about wanting to take

medication. He really never was interested in taking medication.

* * *

[RECORD—P. 534] Q Dr. Jimenez, does Mr. Perry have a different diagnosis or prognosis after your February 4th, 1988 interview as opposed to your interviews and observations prior to trial? Have you detected any different symptoms in your February 4th, 1988 interview as opposed to what you observed and saw prior to his trial?

A No, sir.

* * *

[RECORD—P. 539] MR. NORDYKE: Now that we're back on record, Your Honor, in connection with this proceeding I would offer, introduce and file into evidence, into evidence as Exhibits Two, Three and Four various medical records, the originals of which I'll be putting into evidence, copies of which I have provided to everybody, including the physicians in this case in bound format.

THE COURT: Which volumes **[RECORD—P. 540]** are those?

MR. NORDYKE: It varies. Exhibit Two, Your Honor, corresponds with volume six. This is the Lake Charles Mental Health records.

* * *

[RECORD—P. 542] THE COURT: Let it [Exhibit Two] be filed.

* * *

[RECORD—P. 543] THE COURT: Which are the Feliciana Forensic documents. The Court will allow them [Exhibit 3] to be filed as such.

* * *

[RECORD—P. 544] THE COURT: Let them [Exhibit 4] be filed as marked.

* * *

MR. NORDYKE: And, D-5 will be the Angola records

* * *

[RECORD—P. 545] THE COURT: Let that be filed as Exhibit Five.

MR. NORDYKE: And we will supplement the record with that at

the next break. We will call Dr. Aris Cox, please.

* * *

[RECORD—P. 546] [EXAMINATION OF DR. ARIS COX]

Q You are one of Mr. Perry's treating psychologists at Angola, are you not?

A No. I'm his treating psychologist [sic] at Angola, yes.

* * *

[RECORD—P. 552] A I have not noticed him to have any symptoms of tardive dyskinesia.

* * *

[RECORD—P. 553] A Well, there are medicines that can be given for side effects that improve the extra-parameatal symptoms, and also discontinuing neuroleptic medication can prevent it.

* * *

A I have seen him on and off medication several times now and I have seen him respond to medication. When I saw him **[RECORD—P. 554]** back on the 3rd of March he looked about as good to me then as I've ever seen him look. At that time I thought he probably was competent. He deteriorates quickly when off medication. So his competency status tends to change, it's very labile, it moves about. What I meant by this perhaps offhand remark was that his competency changes frequently and he's not in the same place all the time. And sometimes he's competent and sometimes he's not. That's what I meant by that.

* * *

BY THE COURT:

Q Who made the decision, it you know, to place him on Haldol?

A One of the other psychiatrists there, a Dr. Jalisonne, and Dr. Montero has seen him also and they had put him on the medication.

* * *

Q * * * But my question is do you agree with **[RECORD—P. 555]** their . . .

A That treatment is a rational appropriate treatment for the psychiatric illness that this man has, in my opinion.

Q And does Haldol affect him beneficially?

A Yes, sir, when he takes it in adequate doses it affects him beneficially.

Q What is an adequate dose, in your opinion?

A Thirty milligrams a day, or more.

* * *

[RECORD—P. 559] Q * * * Could you give me your definition of Schizoeffective Disorder, please?

A It is a psychotic illness characterized by a mixture of symptoms which include mood swings, disorganized thought processes, and certain other symptoms, such as, fixed false beliefs, such as, delusions, response to non-existent stimuli, such as, hallucinations, and disorganized thinking.

Q You used another word on me in your definition that I want you to define for me and that is psychotic illness.

A Well, psychotic illness is generally accepted as being an impairment of mental functioning to such an extent that the person is unable to meet the ordinary demands of life, I believe the AMA says. And, also, that there specifically is meant that there contact or appreciation of external reality is impaired. They hear things that aren't there, they see things that aren't there, they misinterpret what goes on around them.

* * *

[RECORD—P. 561] A To me, the changes that have occurred in him, his response to medication has been valuable to me in reaching conclusions about him.

Q Explain to me why.

A Because he gets better when he takes medication and he gets worse when he doesn't. And I think this is indicative of the fact that he has a process going on that responds to the medication. And, secondly, I think argues against the fact that he's malingering because in my experience people who malinger tend to do it whether they're on medication or not.

* * *

[RECORD—P. 567] Q Now you mentioned to me also that there was neuroleptic medication?

A Yes, sir.

Q Could you give me a definition for that?

A Neuroleptic medications such as Haldol is the name applied to these medications which are given to people for certain psychiatric illnesses, and they basically suppress, control, or improve the symptoms of the illness.

Q Okay. And what illness is the specific case Mr. Perry endures?

A He's being given this drug because he has a diagnosis of **[RECORD—P. 568]** Schizoeffective Disorder.

Q And this neuroleptic drugs will suppress what particular symptoms of Schizoeffective Disorder?

A Makes his thinking become coherent and rational, it makes his delusional beliefs either go away or become much less compelling or controlling. If he's hallucinating it will suppress or cease the hallucinations, will make him less labile and agitated.

Q Okay, so you told me he would become passive, it will reduce his delusions . . .

A Not passive, but he will . . .

Q Less hostile?

A Less hostile, less aggressive, less bouncing around off the wall.

Q All right, so, what else do we have besides less hostile, and no delusions or reducing . . .

A Thinking more coherently, and more in contact with his environment.

Q More coherently means what?

A Well, more coherent means that he could sit down and give me—I could ask him a question and he can develop an answer and explain an answer to me in a logical fashion, carry out a discussion with me and string together three or four or five thoughts or concepts in a logical sequence that makes sense. If, for example, I ask him, for ex-

ample, tell me what happened when you were in the hospital last week, he's able to sit down and tell me what was going on, why they took him to the hospital, how long he was there, etcetera, etcetera, in a coherent fashion. When he's not on medication he rambles so that he goes from talking about the hospital to something that happened before he ever came to Angola, **[RECORD—P. 569]** to something else that is completely unrelated.

* * *

[RECORD—P. 571] A We were discussing the issue of the man's competency and I said it has to do with whether or not he's on medication or not. When he's on medication I think he's competent, when he's not I don't think he is. And he [Mr. Nordyke] was aware that Michael was being given medication at Angola and he was taking it. And he indicated to me the he was going to advise him to quit taking it or see to it that he stopped taking it.

* * *

[RECORD—P. 573] A Is a specific motor—there's two specific motor pathways in the nervous system, the parameatal and the extra-parameatal motor systems. They control motor movement and coordination. These drugs have affects on so-called extra-parameatal system and produce certain movement disorders in patients.

Q Extra-parameatal . . .

A Parameatal.

Q . . . parameatal means controlling motor movement?

A Yes.

Q And how does that relate to Mr. Perry?

A Well, it relates to Mr. Perry that he develops sometimes these symptoms when he is taking Haldol. These symptoms are a recognized side effect of this class of drug.

* * *

[RECORD—P. 574] A Do I think he has tardive dyskinesia now?

Q Yes.

A No, I do not think he has it now.

* * *

[RECORD—P. 579] MR. NORDYKE: Dr. Curtis Vincent, please.

* * *

[RECORD—P. 587] [EXAMINATION OF DR. CURTIS VINCENT]

Q What was your job at Feliciana Forensic Facility when you were there?

A It varied some over the years that I was there. For a while I was acting chief psychologist whenever I was hired in 1979 until I hired someone to be the chief psychologist there. Once I hired someone for that position I became a clinical psychologist simply working there in that position. Through those years more than anything else I was doing psychological evaluations of individuals to help determine competency to stand trial, sanity, competency for other issues. I also did some treatment, individual and group. I put together and managed a program to treat some of the patients who were there.

* * *

[RECORD—P. 589] Q Dr. Vincent, you were appointed by the Court to evaluate Mr. Michael Owen Perry with reference to his competency to be executed, were you not?

A Yes, I was.

Q And as I understand your report you went to Angola and evaluated him on March 5th of 1988, is that correct?

A That's correct.

* * *

[RECORD—P. 590] He did indicate that he knew that he would be executed if he were found competent to proceed. * * * He was very tangential with me, that is, that as I asked him questions he would initially typically respond to that question very quickly, slight off the subject, and talked **[RECORD—P. 591]** about something completely irrelevant.

* * *

[RECORD—P. 592] Q Did Mr. Perry indicate to you that he was God?

A Yes, he indicated at least at one point that he was God.

Q What about his marital status?

A He told me that he had married a woman named Susan Bordelon since being at Angola and that he was—well, he told me that he had married her. I didn't go into any further detail after that.

* * *

Q What about auditory hallucinations?

A He told me at that point that indeed he was hearing voices in his head talking to him and telling him various things. **[RECORD—P. 593]** And I asked him in particular what those were and very often they were profanities. And at one point he blurted out that the voice was saying, this person is innocent. He also indicated to me that he had been having auditory hallucinations at the time of the offense.

* * *

A I also evaluated him in 1983 at Feliciana Forensic

* * *

Q I believe in 1983 your diagnosis was that of Schizoeffective Disorder. Has that changed?

A I believe that the diagnosis stands today, the same diagnosis.

* * *

[RECORD—P. 594] A I'm assuming he was taking medication at that point.

Q Okay.

A The security guard said that he indeed had been taking medication and that the night lieutenant said that he had observed him taking medication. From my many years working in a psychiatric facility there are ways to put it in your mouth and not take it. I don't know that he was indeed taking it at that point. * * * **[RECORD—P. 599]** There are times when an individual can be administered medication and he can put it in his mouth but not swallow it. * * *

Q Do crazy people and not crazy people both fain [sic] taking medication?

A Yes, they do.

* * *

[RECORD—P. 615] Q All Right, so, this psychological screening

your conclusion was a psychotic disorder characterized by high level of suspiciousness, coupled with a tenuous grip on reality. I mean . . .

A That's one of my conclusions.

* * *

[RECORD—P. 616] Q What treatment would you suggest?

A With the psychotic thinking that I see in him as of March, uh, I think medication would be the primary treatment modality to use.

* * *

[RECORD—P. 626] Q Is it correct to say that your conclusion was that he had an understanding of the functions of the court?

A One of my conclusions was that he indeed understood the functions—many of the functions of the court and he understood the rule[sic] of the various members of the court, yes.

* * *

[RECORD—P. 628] Q All right. But you also say that he does understand the charges and did understand the results of being found competent and he does understand the courtroom (inaudible) if we may use that terminology for the functions of the different parties, correct?

A Yes, that's correct.

* * *

[RECORD—P. 629] A As of March 5th, as I indicated, he was very inconsistent in a number of areas but in particular regarding his actions at the time of the murders and around that time. And that was very inconsistent. He was also very tangenital, he had some difficulty paying attention and as a result I would see his having some difficulty assisting in his defense today, for instance.

* * *

[RECORD—P. 634] MR. NORDYKE: Dr. Estes.

THE COURT: Dr. Estes, you have been called as the next witness.

[RECORD—P. 637] [EXAMINATION OF DR. GLEN ESTES]

* * *

Q Dr. Estes, you were appointed to evaluate Michael Owen Perry, were you not?

A That's correct.

Q And of the three persons that have preceeded you on the witness stand I believe you examined him latest in time, on March 9th, 1988, is that correct?

A That's correct.

* * *

[RECORD—P. 641] A He did not tell me that he was married to Suzanne Bordelon, he told me that he was married at age seven, however.

* * *

[RECORD—P. 643] Q You indicated that you wished to be relieved of any responsibility for treatment of Mr. Perry.

A That's correct.

Q Besides not functioning in a prison setting except at the request and volunteering to do it for the judge, would you pursuant to his request volunteer to do it? That is, treat Mr. Perry.

A No, I would not volunteer to do that.

* * *

[RECORD—P. 644] Q * * * tell me can you treat a man to make him sane so he can be executed?

A Can I . . .

THE COURT: That's not the issue before me today, Mr. Salomon. I'm not going to make him answer the question. The inquiry today is competency to be executed. Let's go forward.

Q Doctor, do you have any moral or ethical dilemmas presented in a case of this nature?

MR. NORDYKE: Same objection, judge.

THE COURT: That's not his decision to make, that's my decision if we ultimately get there, Mr. Salomon.

* * *

[RECORD—P. 649] Q How many times did you meet with Mr. Perry?

A Once.

Q For what period of time?

A About an hour.

* * *

[RECORD—P. 660] THE COURT: Let the record show the defendant is in court with counsel and the State is represented by the Assistant Attorney General. I spoke briefly with defense counsel in the hallway outside the courtroom and I was advised that the defendant will be called as a witness. The court reporter will, of course, attempt to make as best a transcript as she possibly can but in the event that that is not possible I understand that the Defense, and I'll ask the State, if you have any objection to submitting the defendant's testimony on the video tape itself. Mr. Salomon, would you have any objection to that? We're going to probably make a transcript but what I'm saying is it may not be possible. I don't know if it is or not but whatever we get I'm going to submit the video tape also. Any comments or thoughts or objections you have on that?

MR. SALOMON: Yes, judge, I'm going to object just because I'm not sure that's within court rules and permitted by the State Supreme **[RECORD—P. 661]** Court. And that's going to be my basis.

THE COURT: Your objection is noted and overruled. As I've said, the court reporter will attempt to make as best a transcript as possible but in the even she's not able to do so the Court will submit it to higher courts in the form of this video cassette. So, with that, do you want to call Mr. Perry?

MR. NORDYKE: We will call Mr. Perry as an exhibit.

THE COURT: If you would step up, please.

MR. SALOMON: As an exhibit or as a witness?

THE COURT: He's being called as a witness. If you would raise your right hand and be placed under oath, please.

* * *

[RECORD—P. 663] [EXAMINATION OF MICHAEL PERRY]

Q * * * A minute ago you told me you were ninety percent. What is that?

A Well, like I told the judge, and I didn't mean it, but I was struck by the voices, you know. * * * **[RECORD—P. 667]** Now the truth is is that the voices got me. I wanted to commit suicide the day before I committed five counts of murder. A lot of people saw me do that. A lot of kids learned that. One lady is dead. I want her alive. You said you'd do that. Now once those voices get you—I fought it for twenty years of solid pain. I said, no, I don't want to do that, that's begging. That's what they did to me, they begged me for ninety years. They took it. So I said, okay, I join. Then they killed me for twenty years. Ten years of that was pain, you know. So to answer your question, I didn't do it. But I know who did. But that's going to cost you twenty million dollars before I can answer your question

* * *

[RECORD—P. 670] Q When were you born, Michael?

A December 3rd, 1954.

Q And who were your parents?

A Chester Adam Perry.

Q And who was your mother?

A Eve, they said Eve. That's what I first heard. And they said—like I read the bible thirteen years, solid pain. Mr. Hymel was a witness to that, you know. I wish you would respect the man and give up, you know, let the man send me to Jackson and have all of that sex activity if that's what they want to do with me, finish it off, you know. Uh, Rene, I like you. I'm shocked to death that you become against me. Uh, I want to give you that but if you don't like it I'll double it. That's my life. I have the right to defend my life, you know. I didn't do it but I know who did. And but, you know, that's whenever it started on me, you know, that's whenever it started. That's between me and you, you know. You told me to say that last night. We met. I ain't going to lie about it, you know, because I'm in front of the microphone. That thing is a cobra. You can't fool me, you know. We spent twenty years together and you beat the hell out of me. That's a legal word to say. I don't know what happened to the camera but you said I'd be on camera but I don't—there it is right there. But anyway, uh, I mean I told you I'd tell you the truth, too, you know, because I like to have fun with you. Uh, I know **[RECORD—P. 671]** your wife. We met before. I don't know why she likes me, uh, she said ninety percent. I said a hundred percent, you know. And so I'm guilty, you know, and I'll pay for it. And the world is going to double. But I was born December 3rd, 1954 and I'm nine percent crazy, that's the truth, that's forever. I'm nine percent crazy. And, uh, that medicine they put me on I'm going to have to file suit for ninety million years.

* * *

[RECORD—P. 691] THE COURT: The Court will take this matter under advisement. I will give Defense counsel * * * two weeks, to file any memorandum in support of your **[RECORD—P. 692]** position * * * You have until the 20th of May at 5:00 p.m. to file a response, Mr. Salomon, if you wish to do so. * * * I will rule on this case at 9:00 a.m., May 26th.

MR. SALOMON: And, Your Honor, uh, is there something special you wish to be addressed in this memoranda?

THE COURT: I think the issues that have been formed. I think all of you are familiar with the Perry case from the Supreme Court, the Ford versus Wainwright decision, the issue of—one issue raised by one of the witnesses today is whether or not the Court has the authority or whether or not a defendant has the right to refuse medication. That's an issue, also.

* * *

EXCERPTS FROM PROCEEDINGS HELD AUGUST 26, 1988

[RECORD— P. 698]

THE COURT: * * * The first matter that the Court is going to address today is the defense objection to the Court considering these **[RECORD—P. 699]** weekly or monthly reports filed into the record of this case by the officials of the Department of Corrections. Those reports were filed at my request, or sent to this Court by my request. * * * **[RECORD—P. 700]** Next business before the Court is that the Court is, based on the weekly reports that I have received, I feel that there has probably been a change in the mental condition of the defendant, I am ordering Drs. Cox and Jiminez to re-examine the defendant relative to his competency as set up by the Louisiana Supreme Court in the original Michael Owen Perry decision. * * *

[RECORD—P. 701] THE COURT: We'll do this at 10:00 that morning, September the 30th at 10:00 a.m. And, of course, the defendant will be brought into court for the purposes of that hearing. Pending that hearing, pursuant to RS 15:830.1, the Court is ordering that the Department of Public Safety and Corrections provide treatment and medication to the defendant, as to be determined by the medical staff of the Department of Public Safety and Corrections.

* * *

EXCERPTS FROM SANITY HEARING HELD SEPTEMBER 30, 1988

[RECORD—P. 712] THE COURT: * * * Dr. Jimenez is ill and will not be able to be here today, so we'll take her testimony at a later date. And at this **[RECORD—P. 713]** time, the Court will call Kovac as a witness. Step up, please.

* * *

[RECORD—P. 714] DR. KAY BRASIER KOVAC, called by the Court as a witness to testify herein, after being duly sworn, testified, as follows:

* * *

A My name is Kay Brasier Kovac, I'm currently employed at Louisiana State Penitentiary, Angola. I have been medical director there since October of 1985.

* * *

[RECORD—P. 722] THE COURT: Okay, I'll let Defense counsel question Dr. Kovac. Which one of you wants to question her?

MR. NORDYKE: I'll take it, Your Honor.

* * *

[RECORD—P. 724] Q And, in fact, Michael's affect and delusional status can vary from day to day, can it not?

A It depends on—just in my limited experience with Michael, it depends on whether he had taken his medication.

Q But it does vary from day to day?

A Well, just using this example—this week as an example it hasn't varied, you know, what I saw Monday was the same as I saw yesterday.

Q That's because you gave him—that's because he was given a shot of Haldol-D on September 3rd?

A That's correct, because he had his medication.

* * *

[RECORD—P. 731] Q And in your administrative managerial capacity, as a supervising physician at the Angola State Hospital, did you

see some correlation between the acceptance of medication and this behavior you described as being acutely psychotic?

* * *

[RECORD—P. 732] A When Michael has not taken his medication he's had—you know, gone into these episodes.

* * *

[RECORD—P. 735] THE COURT: Let the record show * * * Dr. Cox has been called by the Court as a witness and has been placed under oath.

* * *

[RECORD—P. 747] THE COURT: * * * Gentlemen, as I've indicated, the only other person whose testimony I'd like to hear is that of Dr. Jimenez who is not here today, as I told you the reason why. And pursuant to the bench conference we have decided on October 21st at 10:00.

* * *

EXCERPTS FROM SANITY HEARING HELD OCTOBER 21, 1988

[RECORD—P. 761] [EXAMINATION OF DR. JIMENEZ] Q I have just two questions, in response: The mood, affect, speech and coherence that you found fairly appropriate on these two visits are solely the result of the Haldol-D, is that true?

A That's right, sir.

Q And in summary—and I don't want to put words in your mouth—but, in summary, isn't it correct to say that if Michael is given large amounts of Haldol-D, he can be, he can, on occasion, be appropriate? And, now, on—if he is not given Haldol-D, he is going to be crazy?

A That's accurate, in the sense that the dosage of the medication is being readjusted based on the mental status and behavior of the patient.

* * *

[RECORD—P. 763] BY THE COURT: Gentlemen, I have reviewed your various briefs that you've submitted throughout these proceedings, and I have reviewed 'em, I've done my own independent research and I am prepared to rule. Is there any further argument not included in your brief or memoranda that you want to state at this time, Mr. Nordyke?

MR. NORDYKE: Your Honor, I don't believe so. I think everything that we have stated is either objected to in written form or else argued.

What about you, Mr. Giarrusso?

MR. GIARRUSSO: Likewise, Your Honor.

And, Ms. Denlinger?

MS. DENLINGER: Yes, Sir.

* * *

[RECORD—P. 766] BY MR. NORDYKE: The only thing I would point out in rebuttal, Your Honor, is the doctor's testimony is clear, that all things were said to the doctor on the two occasions in September were the result of the Haldol-D; that squares the issue.

* * *

[RECORD—P. 794] [BY THE COURT]: So I am going to set an appeal return date, or a writ perfection date, thirty days from today. That date will be November the 22nd. Assignments of error to be filed by November 16th. Transcript to be filed by November 10th.

And the Court will stay the execution of the judgment entered today.

* * *

APPENDIX B

LOUISIANA CODE OF CRIMINAL PROCEDURE, TITLE XXI, CHAPTER 1 "MENTAL INCAPACITY TO PROCEED"

Art. 641. Mental incapacity to proceed defined

Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense.

Official Revision Comment

(a) The test of mental incapacity conforms with the prior law and is a test that has been almost universally adopted. It is a combination of the formula stated in Art. 267 of the 1928 Louisiana Code of Criminal Procedure and the clearly stated application of that principle in Sec. 4.04 of the A.L.I. Model Penal Code. The A.L.I. Comment states:

"More commonly however, the statute merely refers to 'insanity' or 'unsound mind' but, when that is so, the term has almost always been interpreted judicially to refer to a defendant's incapacity to understand the proceedings or to participate in his defense." The Comment further points out that in England also, ". . . the inquiry appears to be genuinely focused on the defendant's capacity to understand and to defend. See Royal Commission on Capital Punishment, Report (1953) par. 223."

(b) The effect of amnesia which renders the defendant unable to remember the crime or to account for his conduct or whereabouts on that occasion, is generally stated in State v. Swails, 223 La. 751, 66 So.2d 796 (1953). In Swails, where the defendant had pleaded insanity at the time of the crime as a defense, the Louisiana Supreme Court rejected the claim of amnesia as lack of capacity to stand trial; and Justice McCaleb briefly stated (66 So.2d at 800):

"This contention would be very forceful and persuasive were this a prosecution in which the accused was pleading not guilty for, in such case, his inability to inform his counsel of any

of the facts regarding his own movements in relation to the charges against him would materially affect him in his defense. But, here, appellant is pleading insanity at the time of the commission of the crimes—a special defense under our law. LSA-R.S. 14:14 and 15:261. His alleged amnesia as to the events occurring at, before and after the crimes were committed is not a factor which hampers his defense. On the contrary, the very fact that appellant does not remember anything concerning his alleged criminal acts may be of material aid to his counsel in their presentation of a case of insanity and his testimony, if he sees fit to take the stand, may have considerable weight with the jury."

Alcoholic amnesia, consisting of the defendant's failure to recollect his behavior while under the influence of excessive alcoholic beverages is never a bar to trial, since it is not "a result of a mental disease or defect." State v. Palmer, 232 La. 468, 94 So.2d 439 (1957).

Art. 642. How mental incapacity is raised; effect

The defendant's mental incapacity to proceed may be raised at any time by the defense, the district attorney, or the court. When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed.

Official Revision Comment

(a) Although present incapacity to stand trial is ordinarily urged by the defense, it may be raised by the district attorney or on the court's own motion. It is in the interest of fair administration of justice that a defendant who lacks the capacity to understand the proceedings against him and to assist in his defense should not be brought to trial while that condition exists. Art. 267 of the 1928 Code of Criminal Procedure, as amended in 1932, similarly provided for appointment of a lunacy commission whenever "the court has reasonable ground to believe that the defendant . . . is insane or mentally defective to the extent that (he) is unable to understand the proceedings against him or to assist in his defense." This provision was applied in State v. Hebert, 186 La. 308, 172 So. 167 (1937), to uphold the trial judge's appointment of a lunacy commission on the district attorney's suggestion that the defendant might be mentally unfit to proceed with the trial, and despite the fact that no plea of present insanity had been tendered by the defense.

(b) When the question of the defendant's mental capacity to proceed has been raised, all proceedings in the case are stayed until that issue is determined, thus making sure that no action prejudicial to the defendant will be taken until the defendant's capacity to understand the nature of the proceedings and to assist in his defense has been established. An exception is made as to *institution* of the criminal prosecution. This may sometimes be necessary in order to prevent the time limitations on the institution of the prosecution from running out while the proceedings against a mentally incapable defendant have been stayed. Only the time limitations *upon commencement of trial* are interrupted by insanity of the defendant. See Art. 579.

Art. 643. Order for mental examination

The court shall order a mental examination of the defendant when it has reasonable ground to doubt the defendant's mental capacity to proceed. Prior to the ordering of any such mental examination, the court shall appoint counsel to represent the defendant if he has not already retained counsel. *Amended by Acts 1975, No. 325, § 1.*

Official Revision Comment

(a) The ordering of a mental examination as to the defendant's present capacity to proceed rests in the sound discretion of the court. It is not enough that the defense has filed a motion urging the defense, but there must be sufficient evidence to raise a reasonable doubt as to such capacity. Art. 267 of the 1928 Code providing for the defense of present unfitness, has been similarly construed in State v. Ridgway, 178 La. 609, 152 So. 306 (1934); State v. Neu, 180 La. 545, 157 So. 105 (1934); State v. Messer, 194 La. 238, 193 So. 633 (1940); State v. Washington, 207 La. 849, 22 So.2d 193 (1945); State v. Ledet, 211 La. 769, 30 So.2d 830 (1947); State v. Green, 221 La. 713, 60 So.2d 208 (1952). If there is a substantial doubt as to the defendant's mental capacity it is an abuse of discretion for the trial judge to refuse to order a mental examination. See State v. Allen, 204 La. 513, 15 So.2d 870 (1943).

(b) The mental examination ordinarily will be limited to a determination of present mental capacity to proceed. It will not include a determination of the defendant's mental condition at the time of the crime, unless the defense of insanity at the time of the crime is urged and "becomes an issue in the cause." State v. Chinn, 229 La. 984, 87 So.2d 315 (1955), discussed in The Work of the Louisiana Supreme Court for the 1955-1956 Term—Criminal Law and Procedure, 17 La.L.Rev. 404, 411 (1957).

(c) A defendant whose mental capacity to proceed is in doubt may not be qualified to determine his need for legal assistance nor capable of procuring counsel; therefore, this article makes special provision for counsel, because the usual provisions for appointment of counsel at arraignment do not afford full protection of such a defendant's interests. As under former R.S. 15:271, enacted in 1964, this right to counsel is not limited to felony cases.

Art. 644. Appointment of sanity commission; examination of defendant

A. Within seven days after a mental examination is ordered, the court shall appoint a sanity commission to examine and report upon the mental condition of the defendant. The sanity commission shall consist of at least two and not more than three physicians who are licensed to practice medicine in Louisiana and have been in the actual practice of medicine for not less than three consecutive years immediately preceding the appointment. No more than one member of the commission shall be the coroner or any one of his deputies. The court may appoint, in lieu of one physician, a psychologist who is licensed to practice psychology in Louisiana and who has been engaged in the practice of clinical or counseling psychology for not less than three consecutive years immediately preceding the appointment.

B. The physicians appointed to make the examination shall have free access to the defendant at all reasonable times. The court shall subpoena witnesses to attend the examination at the request of the defendant, the commission, or any member thereof.

C. For the purpose of the mental examination, the court may order a defendant previously released on bail to appear for mental examinations and hearings in the same manner as other proceedings.

Amended by Acts 1975, No. 325, § 1; Acts 1987, No. 577, § 1.

Official Revision Comment

(a) Other than the minimal requirements that the members of the sanity commission must be regularly licensed physicians with three years' actual practice, the determination of the qualifications of the members is left in the sound discretion of the trial judge. It is contemplated that Louisiana courts will continue their practice of appointing a psychiatrist or psychiatrists when available, as under a similar discretionary provision of amended Art. 269 of the 1928 Code of Criminal Procedure. Similarly, the coroner will frequently be well qualified to serve as a member of the commission and may be appointed. It is logical to assume that the court will appoint the most competent physicians available—for the value and weight of the sanity commission's report will largely depend on the competency and prestige of its members.

(b) The type of examination and procedures to be followed will be determined by the sanity commission, subject to such general directions as the court may include in the order for examination. The Louisiana Supreme Court has recently affirmed the wisdom of flexible sanity commission procedures, stating: "There is nothing in the statute requiring that an accused be kept under constant observation for any fixed period of time, and the legislature has not therein attempted to dictate to these experts in the manner and method to be employed by them in conducting their examination, undoubtedly feeling, as do we, that they are eminently better qualified to know just exactly how to best carry out their duties in this respect as the particular facts of each case may warrant." State v. Faciane, 233 La. 1028, 1048, 99 So.2d 333, 340 (1957); State v. Augustine, 241 La. 761, 131 So.2d 56 (1961).

(c) Confinement of the defendant in custody for the purpose of the examination, the right of free access to the defendant at all reasonable times, and the power to procure compulsory attendance of witnesses are all necessary to enable the commission to make accurate and complete investigations.

Art. 645. Report of sanity commission

The report of the sanity commission shall be filed in triplicate with the presiding judge within thirty days after the date of the order of appointment. The time for filing may be extended by the court. The clerk shall make copies of the report available to the district attorney and to the defendant or his counsel without cost.

Official Revision Comment

(a) The A.L.I. Model Penal Code, Proposed Official Draft (1962), § 4.05(1), authorizes commitment for a period not exceeding sixty days or such longer period as the court determines to be necessary. Art. 269 of the 1928 Louisiana Code provided that the sanity commission should report within thirty days. This article is a compromise. It makes the normal period thirty days after the date of the order of appointment, but allows the court to extend the time for filing the commission's report when additional time is required for the examination.

(b) The requirement that the report be filed in triplicate and copies made available to the district attorney and the defendant, makes the report fully available to all interested parties. Art. 269 of the 1928 Louisiana Code of Criminal Procedure similarly required that the report be made in writing and be accessible to the district attorney and the attorney of the accused. The importance of accessibility of a written copy of the report is shown by State v. Winfield, 222 La. 157, 62 So.2d 258 (1952), discussed in The Work of the Supreme Court for the 1952-1953 Term—Criminal Procedure, 14 La.L.Rev. 231, 235 (1953). In Winfield the trial judge was held to have committed reversible error in determining the issue of present insanity on the basis of a telephone report of the findings of the lunacy commission, rather than waiting for the actual filing of a written report. The underlying basis of the Winfield decision clearly appeared in Justice Moise's statement that "The mandatory provisions of the statute—that *the written report of the commission shall be presented to the trial judge and shall be accessible to the district attorney and to the attorney for the accused*—were not followed." (Emphasis by the court.) *Id.* at 161, 62 So.2d at 259.

Art. 646. Examination by physician retained by defense or district attorney

The court order for a mental examination shall not deprive the defendant or the district attorney of the right to an independent mental examination by a physician of his choice, and such physician shall be permitted to have reasonable access to the defendant for the purposes of the examination.

Official Revision Comment

This article, following Art. 268 of the 1928 Louisiana Code, continues the right of the defense or of the district attorney, to have the defendant examined by physicians of their own choice. The Comment to a somewhat similar provision of the A.L.I. Model Penal Code, Proposed Official Draft (1962), § 4.07(2), states that it "clears up a disputed point in a small numbers of jurisdictions where the defendant may have to have the consent of the warden or some other official before a psychiatrist of his own choosing may examine a defendant who is in custody."

Art. 647. Determination of mental capacity to proceed

The issue of the defendant's mental capacity to proceed shall be determined by the court in a contradictory hearing. The report of the sanity commission is admissible in evidence at the hearing, and members of the sanity commission may be called as witnesses by the court, the defense, or the district attorney. Regardless of who calls them as witnesses, the members of the commission are subject to cross-examination by the defense, by the district attorney, and by the court. Other evidence pertaining to the defendant's mental capacity to proceed may be introduced at the hearing by the defense and by the district attorney.

Official Revision Comment

(a) This article adopts the rule of Art. 267 of the 1928 Louisiana Code, and of Sec. 4.06(1) of the A.L.I. Model Penal Code, Proposed Official Draft (1962), that the issue of the defendant's fitness to proceed shall be determined by the court. The A.L.I. Comment to Sec. 4.06(1) lists 11 states and the federal laws (18 U.S.C. § 4244), that exclude a jury trial on the issue of fitness to proceed. Accord: State v. Ridgway, 178 La. 606, 152 So. 306 (1934); State v. Neu, 180 La. 545, 157 So. 105 (1934); State v.

Hebert, 186 La. 308, 172 So. 167 (1937); State v. Bessar, 213 La. 299, 34 So.2d 785 (1948); State v. Cook, 215 La. 163, 39 So.2d 898 (1949).

(b) The requirement of a contradictory hearing follows the rule of Art. 267 of the 1928 Code of Criminal Procedure. State v. Hebert, 186 La. 308, 172 So.2d 167 (1937).

(c) The express provision that the report of the sanity commission is admissible in evidence at the hearing conforms with the A.L.I. Model Penal Code, § 4.06(1) (Tent. Draft No. 4, 1955). The Comment to that provision states that it "may be interpreted as creating or at least allowing for an exception to the hearsay rule in connection with receiving in evidence the report of the examining experts without requiring that they appear and testify, thus obviating the necessity for taking the testimony of these experts in every case in which a report is contested [citing Wis. Stats.]." Nevertheless, full provision is made for utilization of direct testimony of the commission members in explanation and support of their findings.

(d) The last sentence, authorizing the introduction of other evidence, follows through on the right of the defense and the district attorney to have the defendant examined by their own psychiatrist or other physician. The provisions for testimony at the hearing further point up the general proposition that the report is only prima facie evidence of the sanity commission's findings and conclusions. In State v. Hebert, 187 La. 318, 174 So. 369 (1937), the supreme Court considered the testimony of the court-appointed physicians and of other witnesses in concluding that the trial judge had erred in adopting the lunacy commission's report of present insanity. The commissioners' report, according to the supreme court, was not supported by their testimony or by the testimony of all witnesses as a whole.

Art. 648. Procedure after determination of mental capacity or incapacity

A. The criminal prosecution shall be resumed if the court determines that the defendant has the mental capacity to proceed. If the court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and the court shall commit the

defendant to the custody of the Department of Health and Human Resources or a private institution approved by the court for custody, care, and treatment as long as the lack of capacity continues. If the court determines that the defendant's mental capacity is likely to be restored within ninety days by outpatient care and treatment at an institution as defined by R.S. 28:2(28) while remaining in the custody of the criminal authorities, and if the person is not charged with a felony or a misdemeanor classified as an offense against the person and is considered by the court to be unlikely to commit crimes of violence, then the court may order outpatient care and treatment at any institution as defined by R.S. 28:2(28). Defendants committed to the custody of the Department of Health and Human Resources shall be given inpatient care and treatment at an institution as defined by R.S. 28:2(28); however, a person charged with a felony or a misdemeanor classified as an offense against the person and considered by the court to be likely to commit crimes of violence shall be maintained in custody at the forensic unit at Feliciana Forensic Facility.

B. (1) In no instance shall such custody, care, and treatment exceed the time of the maximum sentence the defendant could receive if convicted of the crime with which he is charged. At any time after commitment and on the recommendation of the superintendent of the institution that the defendant will not attain the capacity to proceed with his trial in the foreseeable future, the court shall, within a reasonable time and after at least ten days notice to the district attorney and defendant's counsel, conduct a contradictory hearing to determine whether the mentally defective defendant is, and will in the foreseeable future be, incapable of standing trial and whether he is a danger to himself or others.

(2) If, after the hearing, the court determines the defendant is, and will in the foreseeable future be, incapable of standing trial and may be released without danger to himself or others, the court shall release the defendant on probation. The probationer shall be under the supervision of the Department of Public Safety and Corrections, division of probation and parole, and subject to such conditions as may be imposed by the court.

(3) If, after the hearing, the court determines the mentally defective defendant incapable of standing trial, is a danger to himself or others, and is unlikely in the foreseeable future to be capable of standing

trial, the court shall order commitment to a designated and medically suitable treatment facility. Such a judgment shall constitute an order of civil commitment. However, the director of the institution designated for the patient's treatment shall, in writing, notify the court and the district attorney when the patient is to be discharged or conditionally discharged.

C. The superintendent of the forensic unit of the Feliciana Forensic Facility shall admit only those persons charged with a felony or a misdemeanor classified as an offense against the person and committed on recommendation of a sanity commission, persons charged with a felony or a misdemeanor classified as an offense against the person and found not guilty by reason of insanity, and persons transferred to the forensic unit from state correctional institutions. *Amended by Acts 1975, No. 325 § 1; Acts 1979, No. 318, § 1; Acts 1980, No. 612, § 1; Acts 1982, No. 495, § 1; Acts 1983, No. 399, § 1; Acts 1987, No. 928, § 1, eff. July 20, 1987; Acts 1988, No. 383, § 1.*

Official Revision Comment

(a) Committing a mentally incapacitated defendant to a state mental institution for as long as such incapacity continues is in conformity with the usual disposition of such cases. See Art. 267 of the 1928 Louisiana Code of Criminal Procedure.

(b) Appellate review of the court's determination of mental capacity to proceed or of the necessity of ordering a mental examination, will follow the normal procedures. If the court improperly refuses to order a mental examination and appoint a sanity commission, the defendant's remedy is to reserve a bill of exceptions and urge this objection as a ground for a motion for a new trial which will be the basis of an ultimate appeal. State v. Leon, 177 La. 293, 148 So. 54 (1933). Likewise, the defendant can reserve a bill of exceptions to the court's determination of present mental capacity and have that question reviewed on appeal. State v. Neu, 180 La. 545, 157 So. 105 (1934).

The defendant has a right of direct appeal from a determination of present lack of capacity to stand trial when he would prefer an immediate trial rather than commitment to a mental institution. "(A)n appeal lies from such judgment [of present incapacity] because it is final in so far as the only issue involved

in such a proceedings is concerned and is prejudicial because it deprives the party of his liberty." State v. Hebert, 187 La. 318, 324, 174 So. 369, 371 (1937); State v. Gunter, 208 La. 694, 23 So.2d 305 (1945). State v. Yaun, 237 La. 186, 110 So.2d 573 (1956), classified this type of ruling as an appealable final judgment.

The state's appellate remedy, as in the case of other adverse preliminary rulings, is necessarily by immediate appeal for it has no review after an acquittal. Although there are no supreme court decisions in point, a ruling that the defendant is presently incapable of standing trial is final determination of that issue, and the state's case might be seriously prejudiced by the resulting delay in bringing the defendant to trial. Such a determination does not relate to the basic issue of guilt or innocence; therefore the facts may be reviewed on appeal. Op.Atty.Gen., 1942-44, p. 249; State v. Hebert, 187 La. 318, 174 So. 369 (1937).

(c) Great hardship may result in some cases, for example, the case of a defendant charged with a nonviolent offense who is committed for a long period pending a finding of present capacity to proceed. In such a situation probation is authorized upon a finding that the defendant is not being helped by continued custody in the mental institution and that he may be released without danger. The public is further protected by the requirement that the probation may be granted only on recommendation of the superintendent of the mental institution and by an order of the committing court. Probation procedures follow the applicable provisions of Art. 657. Conditions of the probation, to be imposed by the court, may include submission to treatment, abstinence from alcohol, special help by parents, or other appropriate requirements designed to aid in recovery and to fully protect the public.

Art. 648.1. Information required prior to admission

No superintendent of an institution shall admit a defendant found by the court to lack the mental capacity to proceed pursuant to Art. 648 unless he is furnished by the court the following information:

(1) The name and address of the defendant's attorney.

(2) The crime or crimes with which the defendant is charged and the date of such charge or charges.

(3) A copy of the report of the sanity commission.

(4) Any other pertinent information concerning the defendant's health which has come to the attention of the court such as injuries sustained at the time of arrest or injuries sustained following incarceration. *Added by Acts 1975, No. 325, § 2.*

Art. 649. Procedure when capacity regained

A. At any time after a defendant's commitment, if the superintendent of the mental institution reports to the committing court that the defendant presently has the mental capacity to proceed, the court shall hold a contradictory hearing within thirty days on that issue.

B. Prior to such a hearing, the court shall appoint counsel to represent the defendant if the defendant does not have counsel, and shall order a mental examination by a sanity commission appointed in conformity with Article 644. If the committing court does not hold a hearing within thirty days, the sheriff of the parish from which the defendant was committed shall appear at the institution within seven days thereafter and shall receive and hold the defendant in custody pending further orders of the committing court. If the sheriff fails to appear with a court order and accept custody of the defendant, the superintendent of the state mental institution or the director of the mental health unit shall notify the judicial administrator and the attorney general of such fact. Thereafter the Criminal Court Fund of the parish from which the defendant was committed shall pay to the general fund of the state the sum of one hundred dollars a day until the sheriff appears and accepts custody of the defendant for the court.

C. The district attorney or the defense may apply to the court to have the proceedings resumed, on the ground that the defendant presently has the mental capacity to proceed. Upon receipt of such application the court shall hold a contradictory hearing to determine if there is reasonable ground to believe that the defendant presently has the mental capacity to proceed. The court may direct the superintendent of the mental institution where the defendant is committed to make a report and recommendation prior to such hearing as to whether the defendant presently has capacity to proceed, or may order an independent mental examination by a sanity commission appointed in conformity with Article 644.

D. Reports as to present mental capacity to proceed shall be filed

in conformity with Article 645, and the court's determination of present mental capacity to proceed shall be made in conformity with the appropriate provisions of Articles 646 and 647.

E. If the court determines that the defendant has the mental capacity to proceed, the proceedings shall be promptly resumed. *Amended by Acts 1975, No. 325, § 1; Acts 1987, No. 928, § 1, eff. July 20, 1987; Acts 1988, No. 383, § 1.*

Official Revision Comment

(a) This article provides a procedure for a redetermination of the present capacity issues when it later appears that the defendant may be capable of proceeding with the trial. The subsequent hearing as to capacity may be instigated by a report by the superintendent of the mental institution to which the defendant was committed, or by an application made by the district attorney or the defense. Certain differences inherent in the two procedures necessitated the partially separate statement.

(b) Under the first paragraph, when the superintendent of the mental institution reports that the defendant presently has capacity to proceed, a contradictory hearing is mandatory. The hearing must be held within thirty days and the defendant must be represented by counsel at the hearing. The requirement of a prompt hearing is fortified by the second paragraph, which authorizes the superintendent of the mental institution to return the defendant to the parish from which he was committed if the hearing is not held within the prescribed thirty days.

(c) Under the third paragraph, when the district attorney or the defense applies to have the proceedings resumed, the court is required to hold a contradictory hearing only if there is reasonable ground to believe that the defendant presently has the mental capacity to proceed, *i.e.*, if there is a prima facie showing of present capacity.

(d) In both situations the ordering of an independent mental examination is discretionary with the court. When the superintendent of the mental institution reports that the defendant is capable of standing trial, the court may not feel that a further examination is necessary. When application is made by the district attorney or the defense, it is quite likely that the order for a men-

tal examination will be directed to the superintendent of the mental hospital where the defendant is committed. Such an examination and report will be a part of the services of that state institution, but the staff psychiatrist making the examination will be entitled to reasonable fees as an expert witness, and traveling expenses when he testifies at the hearing. Art. 660. Appointment of an independent sanity commission, in conformity with Art. 644 is also expressly authorized.

(e) Additional examinations by the defense and district attorney will be authorized under Art. 646. The court's determination of the question of regained capacity to stand trial is in accord with State v. Laborde, 210 La. 291, 26 So.2d 749 (1946), which held that the court was not limited to or bound by recommendations of the physicians.

Art. 649.1. Prescribed medication; administration

When a person is returned to the committing court from an institution pursuant to Article 649 pending a sanity hearing, and the superintendent of the committing institution deems it necessary that the patient receive prescribed medication, it shall be the duty of the chief administrative officer of the parish jail to make such medication available to the person until such time as the coroner or another physician finds that the medication or its prescribed dosage is no longer necessary. *Added by Acts 1975, No. 325, § 2.*

APPENDIX C

LOUISIANA REVISED STATUTES, TITLE 28, SECTIONS 2 AND 171

§ 2. Definitions

Whenever used in this Title, the masculine shall include the feminine, the singular shall include the plural, and the following definitions shall apply:

(1) "Conditional discharge" means the physical release of a judicially committed person from a treatment facility by the director or by the court. The patient may be required to report for out patient treatment as a condition of his release. The judicial commitment of such persons shall remain in effect for a period of up to one year and during this time the person may be hospitalized involuntarily for appropriate medical reasons upon court order.

(2) "Court" means any duly constituted district court or court having family or juvenile jurisdiction. "Court" does not include a city court, which shall have no jurisdiction to commit persons to mental health treatment facilities in civil or criminal proceedings, except when exercising juvenile jurisdiction.

(3) "Dangerous to others" means the condition of a person whose behavior or significant threats support a reasonable expectation that there is a substantial risk that he will inflict physical harm upon another person in the near future.

(4) "Dangerous to self" means the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person.

(5) "Diagnosis" means the art and science of determining the presence of disease in an individual and distinguishing one disease from another.

(6) "Director" or "superintendent" means a person in charge of a treatment facility or his deputy.

(7) "Discharge" means the full or conditional release from a treatment facility of any person admitted or otherwise detained under this Chapter.

(8) "Department" means the Department of Health and Human Resources.

(9) "Formal voluntary admission" means the admission of a person suffering from mental illness or substance abuse desiring admission to a treatment facility for diagnosis and/or treatment of such condition who may be formally admitted upon his written request. Such persons may be detained following a request for discharge pursuant to R.S. 28:52.2.

(10) "Gravely disabled" means the condition of a person who is unable to provide for his own basic physical needs, such as essential food, clothing, medical care, and shelter, as a result of serious mental illness or substance abuse and is unable to survive safely in freedom or protect himself from serious harm; the term also includes incapacitation by alcohol, which means the condition of a person who, as a result of the use of alcohol, is unconscious or whose judgment is otherwise so impaired that he is incapable of realizing and making a rational decision with respect to his need for treatment.

(11) "Informal voluntary admission" means the admission of a person suffering from mental illness or substance abuse, desiring admission to a treatment facility for diagnosis and/or treatment of such condition who may be admitted upon his request without making formal application.

(12) "Major surgical procedure" means an invasive procedure of a serious nature with incision upon the body or parts thereof under general, local or spinal anesthesia, utilizing surgical instruments, for the purpose of diagnosis or treatment of a medical condition. Diagnostic procedures, including, but not limited to, the following, shall not be considered as major surgical procedures:

(a) Endoscopy through natural body openings, such as the mouth, anus, or urethra, to view the trachea, bronchi, esophagus, stomach, pancreas, small or large intestine, urethra, urinary bladder, or ureters, and to obtain from such organs specimens of fluids or tissues for chemical or microscopic analysis.

(b) Sub-cutaneous percutaneous liver biopsy.

(c) Punch biopsy of skeletal muscles.

(d) Bone marrow biopsy.

(e) Lumbar puncture.

(f) Myelogram.

(g) Thoracocentesis.

(h) Abdominocentesis.

(i) Conization of the uterine cervix.

(j) Renal angiography.

(k) Femoral angiography.

(l) Carotid angiography.

(m) Vertebral angiography.

(13) "Mental health advocacy service" means a service established by the state of Louisiana for the purpose of providing legal counsel and representation for mentally disabled persons and to insure that their legal rights are protected.

(14) "Mentally ill person" means any person with a psychiatric disorder which has substantial adverse effects on his ability to function and who requires care and treatment. It does not refer to a person suffering solely from mental retardation, epilepsy, alcoholism, or drug abuse.

(15) "Minor" means a person under eighteen years of age.

(16) "Parent" means a person who is the biological mother or father of an individual or the legally adoptive mother or father of an individual.

(17) "Patient" means any person detained and taken care of as a mentally ill person or person suffering from substance abuse.

(18) "Peace officer" means any sheriff, police officer, or other person deputized by proper authority to serve as a peace officer.

(19) "Person of legal age" means any person eighteen years of age or older.

(20) "Petition" means a written civil complaint filed by a person of legal age alleging that a person is mentally ill or suffering from substance abuse and requires judicial commitment to a treatment facility.

(21) "Physician" means a person permitted to practice and in active practice as a physician under the laws of Louisiana or a person in a post-graduate medical training program of an accredited medical

school in Louisiana or a medical officer similarly qualified by the government of the United States while in the state in the performance of his official duties.

(22) "Psychiatrist" means a physician who has at least three years of formal training or primary experience in the diagnosis and treatment of mental illness.

(23) "Respondent" means a person alleged to be mentally ill or suffering from substance abuse and for whom an application for commitment to a treatment facility has been filed.

(24) "Restraint" means the partial or total immobilization of any or all of the extremities or the torso by mechanical means.

(25) "Substance abuse" means the condition of a person who uses narcotic, stimulant, depressant, soporific, tranquilizing, or hallucinogenic drugs or alcohol to the extent that it renders the person dangerous to himself or others or renders the person gravely disabled.

(26) "Transfer" means the removal of a patient from one mental institution to another without any procedure for admission other than is prescribed by the department.

(27) "Treatment" means an active effort to accomplish an improvement in the mental condition or behavior of a patient or to prevent deterioration in his condition or behavior. Treatment includes, but is not limited to, hospitalization, partial hospitalization, outpatient services, examination, diagnosis, training, the use of pharmaceuticals, and other services provided for patients by a treatment facility.

(28) (a) "Treatment facility" means any public or private hospital, retreat, institution, mental health center, or facility licensed by the state of Louisiana in which any mentally ill person or person suffering from substance abuse is received or detained as a patient. The term includes Veterans Administration and public health hospitals and forensic facilities. "Treatment facility" includes, but is not limited to, the following, and shall be selected with consideration of first, medical suitability; second, least restriction of the person's liberty; third, nearness to the patient's usual residence; and fourth, financial or other status of the patient, except that such considerations shall not apply to forensic facilities:

(i) Community mental health centers.

(ii) Private clinics.

(iii) Public or private halfway houses.

(iv) Public or private nursing homes.

(v) Public or private general hospitals.

(vi) Public or private mental hospitals.

(vii) Detoxification centers.

(viii) Substance abuse clinics.

(ix) Substance abuse in-patient facility.

(x) Forensic facilities.

(b) Patients involuntarily hospitalized by emergency certificate for mental health treatment shall not be admitted to the facilities listed in Subparagraphs (ii), (iii), (iv), (viii), or (x) of this Paragraph, except that patients in custody of the Department of Public Safety and Corrections may be admitted to forensic facilities by emergency certificate provided that judicial commitment proceedings are initiated during the period of treatment at the forensic facility authorized by emergency certificate. Patients involuntarily hospitalized by emergency certificate for substance abuse treatment shall not be admitted to the facilities listed in Subparagraphs (ii), (iii), (iv), or (x) of this Paragraph. Judicial commitments, however, may be made to any of the above facilities except forensic facilities. However, in the case of any involuntary hospitalization as a result of such emergency certificate for substance abuse or in the case of any judicial commitment as the result of substance abuse, such commitment or hospitalization may be made to any of the above facilities, except forensic facilities, provided that such facility has a substance abuse in-patient operation maintained separate and apart from any mental health in-patient operation at such facility.

(c) "Treatment facility" shall not include a jail or prison of any kind, or any facility under the control or supervision of the Department of Public Safety and Corrections unless the facility has been designated by the Department of Health and Human Resources and the Department of Public Safety and Corrections as a treatment facility pursuant to R.S. 15:830.1(B); however, a jail or prison shall not be construed as a forensic facility. Only adult inmates sentenced to the Department of Public Safety and Corrections may be admitted to a treat-

ment facility designated pursuant to R.S. 15:830.1(B).

§ 171. Enumerations of rights; restrictions

A. No patient in a treatment facility pursuant to this Chapter shall be deprived of any rights, benefits, or privileges guaranteed by law, the Constitution of the state of Louisiana, or the Constitution of the United States solely because of his status as a patient in a treatment facility. These rights, benefits, and privileges include, but are not limited to, civil service status; the right to vote; the right to privacy; rights relating to the granting, renewal, forfeiture, or denial of a license or permit for which the patient is otherwise eligible; and the right to enter contractual relationships and to manage property.

B. No patient in a treatment facility shall be presumed incompetent, nor shall such person be held incompetent except as determined by a court of competent jurisdiction. This determination shall be separate from the judicial determination of whether the person is a proper subject for involuntary commitment.

C. The patient in a treatment facility shall be permitted unimpeded, private and uncensored communication with persons of his choice by mail, telephone, and visitation. These rights may be restricted by the director of the treatment facility if sufficient cause exists and is so documented in the patient's medical records. The patient's legal counsel, as well as his next of kin or responsible party must be notified in writing of any such restrictions and the reasons therefor. When the cause for any restriction ceases to exist, the patient's full rights shall be reinstated. A patient shall have the right to communicate in any manner in private with his attorney at all times.

The director of a treatment facility shall ensure that correspondence can be conveniently received and mailed, that telephones are reasonably accessible, and that space for visits is available. Writing materials, postage, and telephone usage funds shall be provided in reasonable amounts to recipients who are unable to procure such items.

Reasonable times and places for the use of telephones and for visits may be established in writing by the director of any treatment facility.

D. Restraint may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or others. In no event shall restraint be utilized solely to punish or discipline a patient, nor is restraint to be used as a convenience for the staff of the treatment facility. A person placed in restraints shall have his status reviewed periodically.

E. Seclusion may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or others. In no event shall seclusion be utilized solely to punish or discipline a patient, nor is seclusion to be used as a convenience for the staff of the treatment facility. A person placed in seclusion shall have his status reviewed periodically.

F. No patient confined by emergency certificate, judicial commitment, or non contested status shall receive major surgical procedures or electroshock therapy without the written consent of a court of competent jurisdiction after a hearing.

If the director of the treatment facility, in consultation with two physicians, determines that the condition of such a patient is of such a critical nature that it may be life threatening unless major surgical procedures or electroshock therapy are administered, such emergency measures may be performed without the consent otherwise provided for in this Section. No physician shall be liable for a good faith determination that a medical emergency exists.

G. Every patient shall have the right to wear his own clothes; to keep and use his personal possessions, including toilet articles, unless determined by a physician that these are medically inappropriate and the reasons therefor are documented in his medical record. The patient shall also be allowed to spend a reasonable sum of his own money for canteen expenses and small purchases, and to have access to individual storage spaces for his private use. If the patient is financially unable to provide these articles for himself, the treatment facility shall provide a reasonable supply of clothing and toiletries.

H. Every patient shall have the right to be employed at a useful occupation depending upon his condition and available facilities.

I. Every patient shall have the right to sell the products of his personal skill and labor at the discretion of the director of the treatment facility and to keep or spend the proceeds thereof or to send them to his family.

J. Every patient shall have the right to be discharged from a treat-

ment facility when his condition has changed or improved to the extent that confinement and treatment at the treatment facility are no longer required. The director of the treatment facility shall have the authority to discharge a patient admitted by judicial commitment without the approval of the court which committed him to the treatment facility. The court shall be advised of any such discharge. The director shall not be legally responsible to any person for the subsequent acts or behavior of a patient discharged by him in good faith.

K. Every patient shall have the right to engage a private attorney. If a patient is indigent, he shall be provided an attorney by the mental health advocacy service, if he so requests. The attorneys provided by the mental health advocacy service or appointed by a court shall be interested in and qualified by training and/or experience in the field of mental health statutes and jurisprudence.

L. Every patient shall have the right to request an informal court hearing to be held at the discretion of the court within five days of the receipt of the request by the court. If the court determines that a hearing is appropriate and if the patient is not represented by an attorney of his own or from the mental health advocacy service, the court shall appoint an attorney to represent the patient. The purpose of the hearing shall be to determine whether or not the patient should be discharged from the treatment facility or transferred to a less restrictive and medically suitable treatment facility.

M. No provision hereof shall abridge or diminish the right of any patient to avail himself of the right of habeas corpus at any time.

N. Every patient shall have the right to be visited and examined at his own expense by a physician designated by him or a member of his family or an interested party. The physician may consult and confer with the medical staff of the treatment facility and have the benefit of all information contained in the patient's medical record.

O. Prefrontal lobotomy shall be prohibited as a treatment solely for mental or emotional illness.

P. No medication may be administered to a patient except upon the order of a physician. The physician is responsible for all medications which he has ordered and which are administered to a patient. A record of medications administered to each patient shall be kept in his medical record. Medication shall not be used for nonmedical reasons

such as punishment or for convenience of the staff.

Q. A person admitted to a treatment facility has the right to an individualized treatment plan and periodic review to determine his progress. The appropriate staff of the facility shall review the person's progress at least at intervals of thirty, ninety, one hundred eighty days and every one hundred eighty days thereafter. The staff shall enter into the person's medical record his response to medical treatment, his current mental status, and specific reasons why continued treatment is necessary in the current setting or whether a treatment facility is available which is medically suitable and less restrictive of the patient's liberty.

R. A person admitted to a treatment facility has the right to have available such treatment as is medically appropriate to his condition. Should the treatment facility be unable to provide an active and appropriate medical treatment program, the patient shall be discharged.

APPENDIX D

LOUISIANA REVISED STATUTES, TITLE 15, SECTION 830.1

§ 830.1. Refusal of treatment by mentally ill or mentally retarded inmates

A. Whenever a mentally ill or mentally retarded inmate refuses treatment and any staff physician, staff psychiatrist, or consulting psychiatrist of the institution certifies that the treatment is necessary to prevent harm or injury to the inmate or to others, such treatment will be permitted for a period not to exceed fifteen days. If treatment for a longer period is deemed necessary, a petition shall be filed in a court of competent jurisdiction setting forth the reasons for the treatment. Treatment shall continue while the hearing is pending. After a hearing at which the mentally ill or mentally retarded inmate is represented by counsel, the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided. If the inmate does not have counsel, the court shall appoint an attorney to represent him. Reasonable attorney fees shall be fixed by the judge and paid by the state.

B. Treatment shall be administered at a treatment facility as designated by law, or at a facility under the control or supervision of the Department of Public Safety and Corrections that has been designated by the Department of Health and Human Resources and the Department of Public Safety and Corrections as a treatment facility.

C. Commitments pursuant to this Section shall be in accord with all procedures required by law in the case of judicial commitment. Nothing herein shall be construed to preclude any person in the custody of the Department of Public Safety and Corrections from any commitment or admission as may be otherwise provided by law.

APPENDIX E

STATE WHICH EXPRESSLY AUTHORIZES MEDICATION TO ACHIEVE COMPETENCY FOR EXECUTION

MARYLAND, Md. Code Ann. art. 27, § 75A (a) (2) (ii) (1987) states: "An inmate is not incompetent merely because his or her competence is dependent upon continuing treatment, including the use of medication."

APPENDIX F

STATES WHICH AUTHORIZE TREATMENT OR STAY OR SUSPEND EXECUTION UNTIL COMPETENCY IS REGAINED.

ALABAMA, Ala. Code § 15-16-23 (1975) authorizes suspending the execution of a death row inmate until the incompetent inmate "is restored to sanity."

ARIZONA, Ariz. Rev. Stat. Ann. § 13-4023 (1978) authorizes a condemned inmate, upon being determined by a jury that he is insane, to be taken and confined in a state hospital "until his reason is restored." Ariz. Rev. Stat. Ann. § 13-4024 (1978) dissolves the suspension once the inmate "recovers his sanity."

ARKANSAS, Ark. Stat. Ann § 16-90-506 (1959) orders an incompetent death row inmate "confined in the state hospital until such time as he may recover his sanity."

CALIFORNIA, Cal. [Suspension of Execution] Code § 3703 (1971) and § 3704.5 (1988) order an incompetent death row inmate "taken to a medical facility of the Department of Corrections" and "there kept in safe confinement until his or her reason is restored," and § 3704 (1971) authorizes a new execution date once the defendant "has recovered his sanity."

COLORADO, Colo. Rev. Stat. § 16-8-110 (1986) provides that no person shall be "tried, sentenced or executed if he is incompetent to proceed at that stage of the proceedings against him"; Colo. Rev. Stat. § 16-8-111 (3) (1986) authorizes the inmate's execution for the same offense "after he has been found restored to competency"; Colo. Rev. Stat. § 16-8-112 (2) (1986) provides that the incompetent inmate shall be committed as provided in Colo. Rev. Stat. § 16-8-105 (4) (1986), which authorizes an incompetent defendant committed to a state facility for "care and psychiatric treatment"; Colo. Rev. Stat. § 16-8-114 (1986) provides for a restoration to competency hearing and authorizes the court to "enter any new order necessary to facilitate the defendant's restoration to mental competency"; Colo. Rev. Stat. § 16-8-114.5 excludes any evidence "resulting from a refusal by the defendant to accept treatment" from the court's consideration in reaching a determination as to "the substantial probability that the defendant will not be restored to competency within the foreseeable future."

CONNECTICUT, Conn. Gen. Stat. § 54-101 (1982) orders a stay of execution and the inmate "transferred to any state hospital for mental illness for confinement, support and treatment until he recovers his sanity" and once "such person has recovered his sanity...said penalty shall be inflicted."

FLORIDA, Fla. Stat. § 922.07 (3) and (4) (1985) provide the governor with the authority to order the insane convict committed to a Department of Corrections mental health facility and "kept there until the facility administrator determines that he has been restored to sanity." Fla. Rule Crim. Pro. 3.811 (1987) provides that a person who "lacks the mental capacity to understand the fact of the impending execution and the reason for it shall not be executed." Rule Crim. Pro. 3.812 (1987) authorizes a hearing de novo on the inmate's competency for execution and allows the court under Rule 3.812 (c) (3) (1987) to "[e]nter such other orders as may be appropriate to effectuate a speedy and just resolution of the issues raised." Rule Crim. Pro. 3.212 (c) (2) (1989) allows the court to order treatment of an incarcerated prisoner once that inmate has been found incompetent to proceed at any "material stage of a criminal proceeding" under Rule Crim. Pro. 3.210 (1989). Rule 3.212 (3) (1989) allows the court to commit the defendant for treatment to "restore a defendant's competence to proceed" if the court finds "(i) [t]hat the defendant meets the criteria for commitment as set forth by statute; (ii) [t]hat there is a substantial probability that the mental illness or mental retardation causing the defendant's incompetence will respond to treatment and that the defendant will regain competency to proceed in the reasonably foreseeable future; (iii) [t]hat treatment appropriate for restoration of the defendant's competence to proceed is available; (iv) [t]hat no appropriate treatment alternative less restrictive than that involving commitment is available." Committee Note under Rule 3.211 (1989) explaining the 1988 amendment states that "appropriate treatment may include maintaining the defendant on psychotropic or other medication. See Rule 3.215." Rule 3.215 (1989) provides that "[a] defendant...shall not automatically be deemed incompetent to proceed simply because his satisfactory mental condition is dependent upon such [psychotropic] medication, nor shall he be prohibited from proceeding solely because he is being administered medication under medical supervision for a mental or emotional condition."

GEORGIA, Ga. Code Ann. § 17-10-60 (1988) provides that a person is "mentally incompetent to be executed" if that person "is presently unable to know why he or she is being punished and understand the nature of the punishment." Ga. Code Ann. § 17-10-61 (1988) provides that an incompetent person shall not be executed. Ga. Code Ann. § 17-10-62 (1988) provides that this article is the exclusive procedure for determining competency for execution. Ga. Code Ann. § 17-10-68 (e) (1988) provides that if mental incompetency for execution is proven, the "court shall enter an appropriate order with respect to any scheduled execution time period and shall enter such supplementary orders as necessary and proper." Ga. Code Ann. § 17-10-71 (1988) provides that if the convict "regains his or her mental competency" then any previously entered stay of execution is vacated.

IDAHO, Idaho Crim. Court Rule 38 provides only generally that any sentence of death shall be stayed "pending any appeal or review." The Idaho State Legislature repealed Idaho Code § 19-2709 through § 19-2712 regulating competency for execution in 1970. Two years later the State Legislature passed a general competency to proceed statute that includes competency to be punished. Idaho Code § 18-210 (1972) provides that "[n]o person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures." Idaho Code § 66-335 (1981) regulates committments of mentally ill convicts. Idaho Code § 19-2523 (1982) allows a court "to authorize treatment during the period of confinement...if, after the sentencing hearing, it concludes by clear and convincing evidence that: (a) [t]he defendant suffers from a severe and reliably diagnosable mental illness or defect resulting in the defendant's inability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law; (b) [w]ithout treatment, the immediate prognosis is for major distress resulting in serious mental or physical deterioration of the defendant; (c) [t]reatment is available for such illness or defect; (d) [t]he relative risks and benefits of treatment or nontreatment are such that a reasonable person would consent to treatment."

ILLINOIS, Ill. Rev. Stat. ch. 38, § 1005-2-3 (1985) provides that a person is "unfit to be executed if because of a mental condition he is unable to understand the nature and purpose of such sentence." Subsec-

tion (4) of that statute provides that "if the offender is found unfit to be executed, he shall be remanded to the custody of the Department of Corrections until he becomes fit to be executed."

KENTUCKY, Ky. Rev. Stat. § 431.240 (1980) provides that the execution of an insane prisoner shall be stayed "until the condemned is restored to sanity." The statute further authorizes the commissioner of corrections to "transfer the condemned person to the state forensic psychiatric facility operated by the corrections cabinet until such time as he is restored to sanity."

MARYLAND, Md. [Crimes and Punishments] Code Ann. art. 27, § 75A (1987) provides that an incompetent inmate is one "who, as a result of a mental disorder or mental retardation, lacks awareness: 1. [o]f the fact of his or her impending execution; and 2. [h]e or she is to be executed for the crime of murder." The execution of such an inmate is forever prohibited, and the incompetent is thereby sentenced to life imprisonment. However, the statute expressly defines "incompetence" as not including an inmate whose competency to be executed is achieved and maintained by medication. Md. Code Ann. art. 27, § 75A (a) (2) (ii) (1987) states: "An inmate is not incompetent merely because his or her competence is dependent upon continuing treatment, including the use of medication."

MISSISSIPPI, Miss. Code Ann. § 99-19-57 (1984) provides that if a convict under a sentence of death becomes insane, "the following shall be the exclusive procedural and substantive procedure....If it is found that the convict is insane...the court shall suspend the execution....The convict shall then be committed to the forensic unit....The order of commitment shall require...a written report be furnished to the court...stating whether there is a substantial probability that the convict will become sane...within the foreseeable future and whether progress is being made toward that goal." The statute further provides that the standard of incompetency for execution should be if the convict "does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court."

MISSOURI, Mo. Rev. Stat. § 552.060 (1989) provides that "[n]o person

condemned to death shall be executed if, as a result of mental disease or defect, he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out." The statute further directs the warden to "order a stay of execution." The insane prisoner is subject to transfer to a mental hospital, and later if he is "certified by the director as free of a mental disease or defect...the governor shall fix a new date for execution...." Mo. Rev. Stat. § 552.050 (1983) authorizes the inmate transferred "to a state mental hospital for custody, care and treatment" for up to 96 hours, after which time the mental health coordinator or head of the facility may file for involuntary detention and treatment. The statute further provides for involuntary treatment for an additional one year.

MONTANA, Mont. Code Ann. § 46-19-202 (1983) provides that if after judgment of death a defendant "lacks [mental] fitness" the execution is suspended and the court "shall commit him to the...state hospital...for so long as the lack of fitness endures...." Once "the defendant has regained fitness to proceed, the warden must be directed by the court to carry out the execution" unless the court determines that "so much time has elapsed since the commitment...that it would be unjust to proceed...."

NEBRASKA, Neb. Rev. Stat. § 29-2537 (1973) authorizes a court to suspend the execution of a convict who appears to be mentally incompetent "until further order. Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is mentally competent or incurably mentally incompetent."

NEVADA, Nev. Rev. Stat. § 176.415 (1987) provides that the execution of the death penalty may be stayed pending the investigation into the sanity of the convicted inmate. Nev. Rev. Stat. § 176.455 (1977) suspends the execution of an insane inmate "until the convicted person becomes sane" and includes an order to the director of the department of prisons "to confine such person in a safe place of confinement until his reason is restored." The statute further provides that "[i]f the convicted person thereafter becomes sane...the judge...shall enter an order vacating the order staying the execution of the judgment."

NEW MEXICO, N.M. Stat. Ann. § 31-14-6 (1984) provides that once a defendant under judgment of death is found insane as provided in

N.M. Stat. Ann. § 31-14-4 (1953), the court must order that "he be taken to the state hospital for the insane, and there kept in safe confinement until his reason is restored." N.M. Stat. Ann. § 31-14-7 (1953) provides that a new execution date will be rescheduled "[w]hen the defendant recovers his reason."

NORTH CAROLINA, N.C. Gen. Stat. § 15A-1001 (a) (1973) provides that "[n]o person may be tried, convicted, sentenced or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as 'incapacity to proceed.'" N.C. Gen. Stat. § 15A-1002 (b) (2) (1989) provides that incapacity to proceed may be raised at any time and when the defendant's capacity is questioned, the court "may order the defendant to a State facility for the mentally ill for observation and treatment, not to exceed 60 days, necessary to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1004 (1985) and N.C. Gen. Stat. § 15A-1006 (1973) require the court to return the defendant to trial "in the event that he subsequently becomes capable of proceeding." If incapacity continues in a felony case for 10 years, the court has authority under N.C. Gen. Stat. § 15A-1008 (1973) to dismiss the charges.

OHIO, Ohio Rev. Code Ann. § 2949.28 (1969) provides that "[e]xecution of the sentence [of an insane convict sentenced to death] shall be suspended pending completion of the inquiry." The comments to this statute cite the standard as "whether he has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate that awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence to convey such information to his attorney or the court." Ohio Rev. Code Ann. § 2949.29 (1969) provides that "[i]f it is found that the convict is insane, the judge shall suspend the execution until the warden or sheriff receives a warrant from the governor directing such execution." Ohio Rev. Code Ann. § 2949.30 (1963) states that "if he is subsequently restored" the warden or sheriff shall report such finding to the governor, "who, when convinced that the convict is of sound mind, shall issue a warrant appointing a time for his execution."

OKLAHOMA, Okla. Stat. tit. 22, § 1005 (1981) requires that once "there is good reason to believe" that a convicted death row inmate has become insane, a jury must be impaneled to consider the inmate's competency. If the jury returns a verdict of insanity, Okla. Stat. tit. 22, § 1007 (1981) requires the court to order the defendant "taken to one of the state hospitals for the insane and there kept for safe confinement until his reason is restored." Okla. Stat. tit. 22, § 1008 (1981) requires the governor to reissue a warrant for the inmate's execution once "the defendant recovers his reason."

SOUTH DAKOTA, S.D. Comp. Laws Ann. § 23A-27A-22 (1979) provides that when a prisoner under sentence of death appears to be mentally incompetent to proceed, the governor is required to establish a sanity commission. S.D. Comp. Laws Ann. § 23A-27A-24 (1979) provides that once the commission finds the defendant mentally incompetent to proceed, the governor "shall suspend execution...and may in his discretion order the defendant removed to the human services center, there to remain confined until he is no longer mentally ill." S.D. Comp. Laws Ann. § 23A-27A-25 (1979) provides that once "the defendant is no longer mentally incompetent to proceed...the defendant shall be forthwith returned and delivered to the custody of the warden..., there to be dealt with according to law." S.D. Comp. Ann. § 23A-27A-26 (1979) mandates that the governor must then issue a new warrant commanding the recovered inmate's execution unless the sentence has been commuted or pardoned.

UTAH, Utah Code Ann. § 77-19-8 (1988) provides that the judgment of death may be suspended in cases of suspected incompetency for execution. Utah Code Ann. § 77-19-13 (1988) provides that the condemned inmate shall be examined under the provisions of Chapter 15, Title 77. If it is found that the defendant is incompetent, "the court shall immediately...enter an order for commitment under chapter 15, Title 77." Utah Code Ann. § 77-15-1 (1980) provides that "[n]o person who is incompetent to proceed shall be tried or punished for a public offense." According to Utah Code Ann. § 77-15-3 (1980), the chapter applies to any person charged with a public offense or serving a sentence of imprisonment. Utah Code Ann. § 77-15-5 (1980) allows the court to commit the individual "to the Utah state hospital, or to another facility for an evaluation not to exceed a period of 30 days based on examination, observation or treatment...." Upon a finding of incompe-

tence, the "court shall order him committed to the Utah state hospital...until the court which has committed him...finds that he is competent to proceed."

WYOMING, Wyo. Stat. § 7-13-901 (1987) provides that a convict under sentence of death lacks the "requisite mental capacity" if he lacks "the ability to understand the nature of death penalty and the reasons it was imposed." Wyo. Stat. § 7-13-902 (1987) provides that the court "shall stay the execution" of an incompetent death row inmate and order an examination. Subsection (f) of the statute provides that if the convict is found incompetent, the "judge shall suspend the execution...until a time when it is found that the convict has the requisite mental capacity."

APPENDIX G

FORMER DEATH PENALTY STATES WHICH STAYED OR SUSPENDED EXECUTION UNTIL COMPETENCY WAS REGAINED

KANSAS, Kan. Stat. Ann. § 22-4006 (1978) provided that the execution of an insane inmate shall be suspended "until further order" and "such proceedings may be had at such times as the district judge shall order until it is either determined that such convict is sane or incurably insane."

MASSACHUSETTS, Mass. Gen. Laws Ann. ch. 279, § 47 (repealed, 1957) provided that once a convict under sentence of death became insane, he was granted "a respite from execution" and the governor was authorized to order his removal "to the hospital...for care and treatment." The respite continued "until it is determined as herein provided that the convict is no longer insane." Mass. Gen. Laws Ann. ch. 279, § 62 (1983), provided the governor with the authority to "respite the execution" of an insane inmate "until it appears...that the prisoner is no longer insane. Upon such respite, the governor may order the removal of such prisoner to the hospital...." The governor could "further respite the execution of the sentence from time to time for a stated period, until it is determined that the prisoner is no longer insane, as herein provided." This capital punishment legislation was held unconstitutional under Article 12, Declaration of Rights of the Massachusetts State Constitution.

NEW YORK, N.Y. [Correct.] Law art. 22-B § 655 (repealed 1970) provided that an inmate under a sentence of death, once found to be insane, could be ordered removed "to a state hospital for insane convicts, there to remain until restored to his right mind, and it shall be the duty of the director of such hospital, whenever, in his opinion, said convict is cured of his insanity, to report the fact to a justice of the supreme court...which justice shall...cause him, the said convict, to be returned to the cutody [sic] of the superintendent of the state institution whence he came, there to be dealt with according to law." N.Y. [Correct.] Law art. 22-B § 657 mandated that the governor, once the defendant was "cured of his insanity" or underwent a "restoration to sanity," to issue a warrant for the inmate's execution. New York's

death penalty statute mandating capital punishment for murders committed by inmates serving a life imprisonment sentence was held unconstitutional in 1984. See *People v. Smith*, 468 N.E. 2d 879 (N.Y. 1984).

APPENDIX H

DEATH PENALTY STATES WHICH INVOLUNTARILY TREAT CRIMINAL DEFENDANTS IN OTHER CONTEXTS

DELAWARE, Del. Code Ann. tit. 11, § 403 (1974) authorizes the court to commit a defendant found not guilty by reason of insanity to the Delaware State Hospital, subject to the court's approval, modification and periodic judicial evaluation of any specific treatment program. Del. Code Ann. tit. 11, § 404 (1974) authorizes the court to "order the accused person to be confined and treated in the Delaware State Hospital until he is capable of standing trial." Del. Code Ann. tit. 11, § 405 (1974) allows the court to order a prisoner who has become mentally ill after conviction but before sentencing "to be confined and treated in the Delaware State Hospital until he is capable of participating in the sentencing proceedings." Del. Code Ann. tit. 11, § 406 (1974) authorizes the Superior Court, after it appears that a prisoner has become mentally ill after conviction and sentence to order the prisoner transferred and confined in the Delaware State Hospital. Del. Code Ann. tit. 11, § 408 commits a defendant found guilty but mentally ill to the Department of Corrections where he "shall undergo further evaluation and be given such immediate and temporary treatment as is psychiatrically indicated....[D]ecisions directly related to treatment for his mental illness shall be the joint responsibility of the Director of the Division of Alcoholism, Drug Abuse and Mental Health and those persons at the Delaware State Hospital who are directly responsible for such treatment." The statute further provides that "[t]he offender may, by written statement, refuse to take any drugs which are prescibed for treatment of his mental illness; except when such a refusal will endanger the life of the offender, or the lives or property of other persons with whom the offender has contact." Del. Code Ann. tit. 11, § 409 authorizes the court to require psychological or psychiatric counseling and treatment as a condition of parole or probation, and failure to continue such treatment, except as the Department of Corrections may agree, is a grounds to revoke such release. The statute further provides that treatment is a condition of probation for any defendant found guilty but mentally ill.

INDIANA, Ind. Code § 35-36-2-5 (1983) provides that a defendant found guilty but mentally ill "shall be further evaluated and then treated in such a manner as is psychiatrically indicated for his mental illness. Treatment may be provided by: (l) the department of corrections; or (2) the department of mental health after transfer...." The statute provides further that "if a defendant who is found guilty but mentally ill at the time of the crime is placed on probation, the court may...require that he undergo treatment." Ind. Code § 35-36-3-1 (1986) authorizes the court, once it finds that the defendant lacks the ability to stand trial, to commit the defendant "to the department of mental health, to be confined by the department in the appropriate psychiatric institution." Ind. Code § 35-36-3-2 (1981) requires the superintendent of the department of mental health to certify the fact that the defendant has regained his capacity to stand trial, and the court shall "hold the trial as if no delay or postponement had occurred."

LOUISIANA, La. R.S. 28:53 (1989) and 28:55 (I) (1978), authorize involuntary treatment of inmates judicially committed; La.C.Cr.P. art. 648 (1988), art. 654 (1982), art. 657 (1987), La. R.S. 15:574.4 H (11) (1989), and La. R.S. 15:830.1 (1987), authorize involuntary treatment of pre-trial detainees, defendants found not guilty by reason of insanity, individuals released on probation or parole, and incarcerated prisoners respectively.

NEW HAMPSHIRE, N.H. Rev. Stat. Ann. § 651:11-a (1987) allows the court to conditionally release a criminal defendant subject to court-ordered treatment. Subd. IV (a) of that statute provides such condition may include "but [is] not limited to, a prescribed regimen of medical, psychiatric, or psychological care or treatment" with the court retaining authority to modify or eliminate conditions imposed. The statute further provides that the criminal defendant "as an explicit condition of release" must "comply with the conditions imposed by the court, including any prescribed regimen of...psychiatric...treatment" or else be subject to arrest.

NEW JERSEY, N.J. Rev. Stat. Ann. § 2C:4-4 (a) (1979) provides that "[n]o person who lacks the capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures." N. J. Rev. Stat. Ann. § 2C:4-6 (1979) further provides that an incompetent defendant may be either committed or released on an

outpatient basis until it is determined "whether it is substantially probable that the defend. ıt could regain his competence within the foreseeable future." Once fitness is regained, proceedings against the defendant resume. The statute also provides for the conditional release or parole of a defendant. Persons acquitted by reason of insanity may be conditionally released, committed or transferred "to a less restrictive setting for treatment" as provided in N.J. Rev. Stat. Ann. § 2C:4-8 (1981) and 2C:4-9 (1979). New Jersey law also provides for the involuntary treatment of convicted sex offenders. N.J. Rev. Stat. Ann. § 2C:47-3 (a) (1979) states: "If the examination reveals that the offender's conduct was characterized by a pattern of repetitive, compulsive behavior, the court may, upon the recommendation of the Adult Diagnostic and Treatment Center, sentence the offender to the Center for a program of specialized treatment for his mental condition...." The statute further provides in subdivision (c) that in lieu of incarceration the court may place the offender on probation with the condition that "he receive outpatient psychological treatment in a manner to be prescribed in each individual case." Because a significant number of inmates in state-owned or operated correctional facilities are mentally ill, New Jersey enacted N.J. Rev. Stat. Ann. § 30:4-82.1 (1986) requiring treatment of those inmates "either in the form of counseling or inpatient treatment during the period of their incarceration." Treatment under N.J. Rev. Stat. Ann. § 30:4-82.2 (1986) includes "treatment with prescription drugs." The statute requires a mental health treatment plan for each inmate including procedures to terminate the treatment when no longer necessary and a biennial review and revision of the plan.

OREGON, Or. Rev. Stat. § 426.490 (1979) states the policy and intent of the Oregon Legislative Assembly in that "the State of Oregon shall assist in improving the quality of life of chronically mentally ill persons within this state...." Or. Rev. Stat. § 426.670 (1979) provides authority to the state's mental health division, either separately or in conjunction with the state corrections division, "to receive, treat, study and retain in custody, as required, such sexually dangerous persons as are committed...." A sexually dangerous person is defined in Or. Rev. Stat. § 426.510 (1977) as "a person who because of repeated or compulsive acts of misconduct in sexual matters, or because of a mental disease or defect, is deemed likely to continue to perform such acts and be a danger to other persons." Or. Rev. Stat. § 426.675 (1979) authorizes the

addressed in this brief.[2]

Because of its membership and its long-standing involvement in other, related cases regarding the use of psychiatric testimony, the "right to refuse" forced psychotropic drugging and the interrelation of these issues with those of incarceration and the dealth penalty, the Coalition believes that it can contribute a valuable perspective as *amicus curiae* to this Court in the instant matter. Many of the clients and members of the Coalition's constituent organizations have had their own experiences dealing with psychiatric testimony and hospital reports as well as with the painful and disabling effects of any use of psychotropic drugs, including the involuntary use of these drugs in hospitals and prisons, in violation of their personal rights and autonomy. Finally, clients and members of the Coalition's organizations have undertaken extensive studies of the issues of the proper use of psychiatric and hospital reports and the uses and effects of the drugs involved in this case. *See, e.g., Riese v. St. Mary's Hospital and Medical Center*, 196 Cal. App. 3d 1388, 243 Cal. Rptr. 241 (1987).

Because of their concern that many patients and prisoners continue to be at risk because of the denial of their rights regarding psychiatric and hospital reports and their right to refuse psychotropic drugs, the members of the Coalition wish to share their experiences and views on these matters with this Court. This precedent-making case will undoubtedly affect the rights of other prisoners regarding these issues across the United States. *Amicus* believes that no other party or *amicus* will present the views of mental health consumers and their advocates to the Court in this case, and for the reasons set forth herein, respectfully submits this brief *amicus curiae*.

[2] See, e.g., the briefs *amicus curiae* filed by the Coalition in *United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galioto*, U.S. , 106 S. Ct. 2683, 91 L. Ed 2d 459 (1986) and *Colorado v. Connelly*, 497 U.S. 157, 107 S. Ct. 1551 (1986). See also the Brief of the Office of the Capital Collateral Representative, et, al. as *amicus curiae* in *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 355 (1986) and the proposed brief *amicus curiae* of the Coalition in *Satterwhite v. Texas*, U.S. , 108 S. Ct. 1792 (1988), on the issue of notice to counsel of a proposed interview by a psychiatrist. Most recently, the Coalition filed a brief *amicus curiae* in *Washington v. Harper*, U.S. , 110 S.Ct. 1028 (1990). See also the brief *amicus curiae* of the New Jersey Department of the Public Advocate, Division of Mental Health Advocacy in *Harper*, 110 S. Ct. at p. 1052, n. 22.

II. SUMMARY OF ARGUMENT

By relying on the *ex parte* hospital reports, the trial court denied petitioner his Sixth Amendment rights to notice, confrontation and the assistance of counsel at the "critical stage" of the determination of his competency for execution. Under this Court's relevant caselaw -- particularly *Powell v. Alabama*, 287 U.S. 45 (1932), *United States v. Wade*, 388 U.S. 218 (1967) and *Satterwhite v. Texas*, U.S. , 108 S.Ct. 1792 (1988) -- petitioner was entitled to the assistance of his counsel before and during the process of preparing the hospital reports, as well as in challenging their substance through cross-examination. Pt. III A

Because of dangerous short term side effects of psychotropic drugs, petitioner had a right to refuse forced drugging solely for the purpose of preparing him for the death penalty. The state's interest in carrying out the sentence cannot justify forced drugging without a demonstrated necessity for legitimate treatment because of petitioner's danger to himself or others. *Washington v. Harper* U.S. , 110 S.Ct. 1028 (1990). Pt. III B.

Under *Ford v. Wainwright*, 472 U.S. 399 (1986) petitioner cannot be executed while his sanity constantly varies "like a moving target." The standard for competency to be executed must require that the condemned have more than merely a passing comprehension of the connection between his crime and his punishment and an awareness of his impending death. Pt. III C.

III. ARGUMENT

A. The Court's Reliance On The *Ex Parte* Records And Reports For Its Competency Determination Violated The Prisoner's Constitutional Rights To Notice, Confrontation And Assistance Of Counsel.

In seminal cases such as *Powell v. Alabama*, 287 U.S. 45 (1932) and *United States v. Wade*, 388 U.S. 218 (1967), this Court has recognized the right of the accused to the assistance of counsel in his defense. In *Powell*, this Court emphasized the particular need for adequate representation for persons with disabilities:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. ... If that be true of men of intelligence, how much more true is it of the ignorant or illiterate, or those of feeble intellect. If in any case, civil or criminal, a state *or* federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. 287 U.S. at 69.

In *Wade*, this Court underscored the special need for the assistance of counsel at certain strategic moments in criminal proceedings:

> In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guanantee to apply to "critical" stages of the proceedings. ... The plain wording of this guarantee encompasses counsel's assistance *whenever necessary* to assure a meaningful defense... [I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State *at any stage of the prosecution, formal or informal, in court or out* where counsel's absence might derogate from the accused's right to a fair trial. *Wade*, 388 U.S. above at 224-226. (emphasis added)

Here, clearly, there could hardly be a more "critical" stage of Mr. Perry's proceedings than the hearing on his competency to be executed.[3]

[3] See also, on the "critical stage" theory, *Cape v. Francis*, 741 F.2d 1287, 1304 (11th Cir. 1984) (Hatchett, J, dissenting)

The trial judge here unequivocally acknowledged his consideration of the hospital records and reports *inter alia* in determining Mr. Perry's competency to be executed. Appendix to the Petition of Writ for Certiorari ("Appendix"). That acknowledgement -- and the court's denial of the objection by the prisoner's counsel to any such consideration -- traduces the clear dictates of this Court's relevant decisions on due process and the right to counsel generally, and its decision in the context of psychiatric reports in particular.

For example, in *Specht v. Patterson*, 386 U.S. 605 (1967), involving a repetitive "sex offender" law, this Court held that due process required that the offender "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Specht*, 386 U.S. above at 610. Quoting from a Third Circuit decision on a comparable statute, the opinion noted:

> **Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. *Gerchman v. Maroney*, 355 F.2d 302, 312 (3rd Cir. 1966)**

Similarly, in *Gardner v. Florida*, 430 U.S. 349 (1977)[4], the Court reviewed a capital sentencing procedure that allowed a judge to impose a death sentence on the basis of secret information not made available to defendants or their counsel. In overturning a death sentence based on that process, the Court dealt with the issue of the priority of such judical confidences from counsel:

[4] ***Gardner* also contains a memorable quotation particularly applicable to the fact situation in this case involving the issue of the relative interests involved in balancing the patient's liberty interest in being free of unwanted drugging and the state's interest in using the drugging to achieve competency for purposes of execution: "[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." *Gardner*, 430 U.S. above at 357.**

> (T)he argument rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases. *Gardner*, 430 U.S. above at 360.

In this case, the issue before the trial court was the competency of Mr. Perry *vel non* for purposes of execution rather than sentencing per se. However, the basic proposition established by those cases is nevertheless applicable here: that due process requires more than a one-sided presentation on the issues before the court, as occured here regarding the hospital reports.

More recently in *Cronic v. United States*, U.S. , 104 S.Ct. 2034 (1984), this Court described the requirements of this evidentiary testing process as follows:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. ... But if the process loses its character as a confrontation between adversaries, the constitutional guanantee is violated. *Cronic*, 104 S.Ct. above at 2045.

Here, the court's consideration of the hospital reports without any such testing in the "crucible" of cross-examination deprived this part of the competency hearing of its adversarial character and, thus, the accused of his Sixth Amendment rights. See also *Ford v. Wainwright*, 106 S.Ct. at 2605 (regarding the critical role of cross-examination in this context)

In specific context of psychiatric reports, the Court has repedly affirmed the necessity for notice, confrontation and the role of counsel. Most recently, in *Satterwhite v. Texas*, 108 S.Ct. 1792 (1988), this Court held that the failure to notify defendant's counsel before a psychiatric interview of his client and the improper introduction of that interview into evidence constituted reversible error. In its opinion the Court relied on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed. 2d

359 (1981) for the proposition that defendants charged with a capital offense have a Sixth Amendment right to have the assistance of counsel before submitting to psychiatric interviews to establish their future dangerousness. In *Satterwhite*, the failure to notify counsel necessarily resulted in the denial of this right of access to the assistance of counsel regarding the forthcoming psychiatric interview. The defendant's lawyer should have been able to prepare his client for the nature of the interview, possible questions and the background and role of the State psychiatrist.[5] Here, the denial of the lawyer's ability to challenge the process by which the hospital records were created, as well as their substance, was, similarly, a denial of the assistance of the defendant's lawyer. See Pet. pp. 6-7, 30-31.[6]

[5] For the purposes of the Sixth Amendment issues in this case, the court's review of Mr. Perry's competency -- similar to a capital sentencing proceeding -- must be viewed as closely analagous to his right to counsel and confrontation at the underlying trial itself. *See, e.g., Strickland v. Washington*, U.S. , 104 S.Ct. 2052, at 2064 (1984):

> The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing procedure like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existance of standards for decision ... that counsel's role in the proceedings is comparable to counsel's role at trial -- to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

[6] *Strickland* also noted a variety of forms of denial of effective assistance of counsel through judicial or other interference:

> Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e.g., *Geders v. United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975) (bar on summation at bench trial); *Brooks v. Tennessee*, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson v. Georgia*, 365 U.S. 570, 593-596 (1961) (bar on direct examination of defendant). *Strickland*, 104 S.Ct. above at 2063-64.

The common thread running through *Satterwhite*, *Estelle*, and other cases involving psychiatric witnesses such as *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985), is that the defendant must be able to defend himself fairly against the State's psychiatric experts, their reports and testimony.[7] These decisions all try to assure that, as much as possible, the defendant has access to a level playing field regarding these issues. Here, absent reasonable notice, an opportunity for confrontation and assistance of counsel regarding the hospital reports, defendant was denied his Fourteenth Amendment as well as his Sixth Amendment rights.

[7] See, on the interrelationship of *Barefoot*, *Ake*, and *Strickland*, Perlin "Dulling the *Ake* in *Barefoot*'s Achilles Heel," 3 *N.Y.L.S. Human Rts. Ann.* 91 (1985). Clearly, under *Strickland*, counsel for the accused may have an obligation to challenge any hospital reports that have not been prepared or presented pursuant to notice to, assistance by or subject to the cross examination of defense counsel.

B. FORCED DRUGGING WITH DANGEROUS PSYCHTROPICS IN ORDER TO PREPARE AN INSANE INMATE FOR THE DEATH PENALTY OFFENDS THE EIGHTH AND FOURTEENTH AMENDMENTS.

1. The Known Dangerousness Of These Drugs Even In The Short Term.

The parties in this case -- and the trial court -- have extensively documented the well known long term side effects of Haldol, the drug involved in this case. *See, e.g.*, Petition, pp. 22-23, Brief in Opposition to Petition for Certiorari ("Brief in Opp. Cert."), p. 5, Appendix, p. 43. Clearly, however, the unique factual situation of this case underscores the importance of the other end of the drugging continuum -- the equally well known, dangerous and painful effects of this and other similar drugs even in their short or near term usage. *See, e.g., Riese v. St. Mary's Hospital and Medical Center*, 196 Cal. App 3d 1886, 243 Cal. Rptr. 241 (1987) and *Goedecke v. State Dept. of Inst.*, 603 P. 2d 123 (Col. Sup. Ct. 1979). In this case, from *amicus'* perspective, this Court must focus on these increasingly well documented short term side effects -- quite apart from the very serious long term dangers of tardive dyskinesia and other side effects related to chronic use of these drugs.

The known short term side effects of the drug Haldol, the drug involved here, include the following:

> Other CNS effects - Insomnia, restlessness, anxiety, euphoria, agitation, drowsiness, depression, lethargy, headache, confusion, vertigo, grand mal seizures, exacerbation of psychotic symptoms including hallucinations, and catatonic-like behavioral states which may be responsive to drug withdrawal and/or treatment with anticholinergic drugs. PHYSICIAN'S DESK REFERENCE, p. 1258 (44th Ed. 1990), (hereinafter "PDR").
>
> Other: Cases of sudden and unexpected death have been reported in association with the administration of HALDOL. The nature of the evidence makes it impossible to determine definitively what role if any, HALDOL played in the outcome of the reported cases. The possibility that HALDOL caused death cannot, of course, be excluded,

but it is to be kept in mind that sudden and unexpected death may occur in psychotic patients when they go untreated or when they are treated with antipsychotic drugs. *PDR*, p. 1286

With these warnings -- based on the 1989 manufacturer's own labeling of Haldol -- the PDR itself suggests the problem in Michael Perry's "treatment" with Haldol in the case.[8] On a day to day, minute to minute basis the forced drugging of Mr. Perry is unpredictable, painful and dangerous -- even life-threatening. Thus, even without addressing the admitted possibility of tardive dyskinesia -- which the State of Louisiana so cynically dismissed (See Brief in Opp. Cert. p. 5: "Yet nothing in the record supports the fact that Perry now suffers from *any* side effects" (emphasis added)) -- the drug involved in this case has repeatedly been included in the list of drugs known for their serious *short term* side effects in numerous judicial opinions upholding the "right to refuse". *See, e.g., Riese v. St. Mary's Hospital and Medical Center*, 243 Cal. Rptr. 241, 209 CA 3d 1303 (1987) rev. grtd. 245 Cal. Rptr. 627, 751 p. 2d 893 (1988) rev. dismissed 259 Cal. Rptr. 669, 774 p. 2d 698 (1989).

Again, even the PDR summary includes repeated warnings regarding yet another of Haldol's more dangerous known side effects:

> Neuroleptic Malignant Syndrome (NMS) - A potentially fatal symptom complex sometimes referred to as Neuroleptic Malignant Syndrome (NMS) has been reported in association with antipsychotic drugs. PDR, p. 1283.

[8] The standard medical reference text on these and other drugs, Goodman and Gilman, *The Pharmacological Basis of Therapeutics* (5th Ed. 1975) includes this caveat regarding Haldol:

> *Side Effects and Toxicity*. Haloperidol produces a high incidence of *extrapyramidal reactions*. These seem to be more prominent in younger patients. Haloperidol therapy should be initiated with caution. Reports of depression with the use of the drug may represent a true side effect or a reversion from a manic state. Severe hematological effects are rare, but leukopenia has been reported frequently; agranulocytosis has also occured. *Op. cit.* p. 167. (emphasis added)

In a recent survey article about NMS, the author concluded as follows:

> Despite treatment, some cases of neuroleptic malignant syndrome are fatal, most commonly from cardiopulmonary failure and myoglobinuria renal failure. Lazarus, *Neuroleptic Malignant Syndrome*, 40 *Hosp. and Comm. Psych.* 1229 (1989) [9] (hereinafter "Lazarus") (citing Shalev, Hermisch, Munitz, *Mortality from neuroleptic malignant syndrome*, 50 Journal of Clinical Psychiatry 18 (1989).

In summary, then, even a necessarily cursory review of the available general medical literature suggests that the use of Haldol and other similar drugs are indeed fraught with peril -- even in the short term. Thus, notwithstanding the State's denial and/or minimizing of Mr. Perry's suffering, [10] there are already indications of serious side effects here. *See, e.g.*, Petition, pp

[9] Of special relevance given the setting in this case -- a southern state prison death row -- are Dr. Lazarus' epidemiological observations regarding NMS: "Neuroleptic Malignant Syndrome has occured worldwide ... (H)ot and humid weather, along with other factors such as physical exhaustion and dehydration may increase the risk of neuroleptic malignant syndrome." Lazarus, p. 1229. In a related context before this Court, a member of the Coalition noted the increased risk of side effects from antipsychotic drugs caused by stress: *See* New Jersey Public Advocate, DMHA brief *amicus curiae* in *Ake v. Oklahoma* 470 U.S. 92, 105 S.Ct. 1087 (1985), p. 52, n.41, regarding stress of trial as affecting reaction to drugs, citing *inter alia* Cameron and Wisner, *An Anticholinergic Toxicity Reaction to Chloropromazine Activated by Psychological Stress*, 167 J. of Nerv. and Ment. Dis. 508 (1979); Hartley, Couper-Smartt and Henry, *Behavioral Antagonism Between Chloropromazine and Noise in Man*, 55 *Psychopharm.* 97 (1977); and, regarding the high stress levels associated with being convicted and sentenced for a crime, Goldberg and Breznitz, eds., *Handbook of Stress: Theoretical and Clinical Aspects* at 340-45 (Free Press, 1983).

[10] To add insult to real injury, like a typical institutional defendant in a "right to refuse" case, the state claims that Mr. Perry's apparent side effects are the result of his "faking". See Brief in Opp. Cert., p. 5 ("... Perry may pretend to suffer from some *lesser* side effects, such as drooling and impairment of his movement.") *Compare Rennie v. Klein*, 462 *F. Supp.* 1131, at 1140 (D.N.J. 1979).

22-23. Quite apart from these observable physical problems, there are also serious questions about some of the more subtle mental effects of the forced drugging on Mr. Perry. See Appendix pp. 94-95, 100, 123. See, also Gutheil and Appelbaum, "Mind Control," "Synthetic Sanity," "Artificial Competence" and Genuine Confusion: Legally Relevant Effects of Antipschotic Medication, 12 Hofstra L. Rev. 77, at 110, 119 (1983)

2. The Imbalance Between The State's Interest In "Treatment" And The Prisoner's Rights In This Case.

In this Court's recent opinion on forced drugging of prisioners, *Harper v. Washington*, there occured a "balancing" of the prisioner's liberty interest as against the state's interest in combating the danger posed to himself and others by a violent, mentally ill inmate under the "reasonable relation" test of *Turner v. Salfey*, 483 U.S. 78, 107 S.Ct. 2254, 96 L. Ed. 2d 282 (1987). See *Harper*, 110 S.Ct. at 1037-1039.

> We confront here the State's obligations, not just its interests. The State has undertaken the obligation to provide prisoners with medical treatment consistent not only with their own medical interest, but also with the needs of the institution. Prison administrators have not only an interest in insuring the safety of prisons' staff and administrative personnel but the duty to take reasonable measures for the prisioners' own safety.... Where an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the danger to others necessarily encompases an interest in providing him with *medical treatment* for his illness. ... The drugs may be administered for no purpose other than *treatment*, and only under the direction of a licensed psychiatrist. 110 S.Ct. at 1039 (emphasis added).

And, finally we hold, that, given the requirements of the prison environment, the Due Process Clause permits the State to *treat* a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the *treatment is* in the inmate's interest. 110 S.Ct. at 1039-40 (emphasis added).

In *Harper*, clearly the phrases "to treat", "medical treatment" and "treatment" apply to the long term forced drugging of the prisoner there, who was serving a prison term *rather than* facing a death penalty as Mr. Perry is here. Similarly, in virtually every other "right to refuse" case involving pre-trial detainees or convicted prisoners, there has been a similar implicit understanding that "treatment" meant long term drugging: See, for example, these comments from the polar opposite opinions in *Charters v. United States*, 863 F 2d 302 (4th Cir. 1988) *en banc, cert. den.*, March 5, 1990 (58 U.S.L.W. 3565 Mar. 6, 1990) (no. 88-6525) and *Bee v. Greaves*, 744 F 2d 1387 (1984), *cert. den.* 469 U.S. 1214 105 S.Ct. 1187 (1985):

> Finally, to be weighed in the balance is the governmental interest at stake, and the administrative and fiscal burdens that would be imposed by Charter's proposed regime. It has to be recalled that the government's role here is not of punitive custodian of a fully competent inmate, but *benign custodian* of one committed to it *for medical care and treatment*. In this relation, the government is under a specific statutory duty to attempt to restore mental competency *so that the patient may be returned to the free society*. ... (I)t seems clear that under Charter's proposed regime any manifestation of objection to medication by a patient would effectively stymie the government's ability to proceed with the *treatment*. *Charters*, 863 F. 2d at 312 (emphasis added)

Compare the above with the following analysis from *Bee v. Greaves* in answer to the state's argued interest in "treating" the inmate by forced drugging with antipsychotics:

> The first interest asserted is not a legitimate state concern in this case. True, the jail is under a constitutional duty to *treat* the medical need of pretrial detainees and such treatment includes mental as well as physical disorders. The premise underlying this duty is that the state may not deliberately fail to provide medical treatment *when it is desired by the detainee*. Medical treatment is designed to ensure that the conditions of pretrial detention do not amount to the imposition of punishment. This constitutional requirement cannot be turned on its head to mean that if a competent individual chooses not to undertake the risks and pains of potentially dangerous treatment, the jail may force him to accept it ...

> ... (A)lthough the state undoubtedly has an interest in bringing to trial those accused of a crime, we question whether this interest could ever be deemed sufficiently compelling to outweigh a criminal defendant's interest in not being forcibly medicated with antipsychtropic drugs ... Generally speaking, a decision to administer antipsychtropic drugs should be based on the legitimate treatment needs of the individual in accordance with accepted medical practices. A State interest unrelated to the well being of the individual or those around him has no relevance to such a determination. The needs of the individual, not the requirements of the prosecutor, must be paramount where the use of antipsychtropic drugs is concerned. *Bee v. Greaves*, 744 F 2d at 1395. (emphasis in original) See also, *Large v. Superior*, 714 P. 2d 399 (Arizona 1986).

Large, in particular, confirms the "for treatment only" justification for drugging prisoners.

> We hold, therefore, that the forced, non-emergency administration of psychotropic drugs which present serious dangers of significant side effects is not justified by security considerations alone. Ordinarily "security" and discipline may be insured by more conventional methods such as incarceration or isolation. Thus, forcible medication with dangerous drugs should be limited to specific emergencies under procedural safeguards. *Large*, 714 P 2d above at 408.

Admittedly, after *Harper's* comments about the use of seclusion or restraints, the threshold for prison forced drugging may have shifted somewhat towards the interests of the prison in security and safety. . See *Harper*, above at 1039, n. 10. However, like *Large*, *Bee*, and even *Charters*, the Washington prison policy in *Harper* initially turned on two factors: "whether the inmate suffers from a "mental disorder"; and second, whether, as a result of that disorder, he is dangerous to himself, others or property." *Harper*, 110 S.Ct. above at 1042.

Similarly, two of the other cases principally relied upon here by the State of Louisiana, are grounded in the "dangerous" rationale rather than purely institutional needs. *See, e.g., Dautremont v. Broadlawns Hosp.*, 827 F 2d 291, at 298 (8th Cir. 1987) ("Clearly, the record shows that Dautremont was both a

danger to himself and to others and the administration of medication against his will was justified.") and *Lappe v. Loeffelholz*, 815 F 2d 1173, at 1174 (8th Cir. 1987): ("Lappe was an inmate at the Iowa State Penitentiary. In November, 1982 he was transferred to another cell because he had been disruptive.") Again, however, in this case there was *no* showing of finding that Mr. Perry required forcible drugging on *any* basis other than the State's interest in attempting to make him competent for execution.

Clearly, under both of these disparate approaches, "medically accepted[11] treatment"[12] is more than whatever is "accepted" in the eye of the beholder. Whatever it is, what it is *not* is mere "processing" for trial, or incarceration *a fortiorori*, it is also

[11] Establishing what is "medically accepted" treatment in the setting of death row may itself be problematic. As Petitioner has already noted (Petition, p. 26, n. 13) both the American Medical Association and the American Psychiatric Association -- as well as doctors involved here -- have expressed reservation about *any* medical and psychiatric involvement in execution. For a recent discussion of this issue, See Ward, "Competency for Execution: Problems in the Law and Psychiatry", 14 *Fla. St. Univ. L. Rev.* 35, 90 (1986) citing Appelbaum, "Psychiatrists' Role in the Death Penalty", 32 *Hosp. & Community Psych.* 761 (1981). Ward specifically deals with the "right to refuse" on death row as well. See 14 *Fla. St. Univ. L. Rev.* at 95-99.

[12] There follows a review of the definitions for "treatment" in the medical dictionaries available on the shelves of a highly rated medical school library in Philadelphia:

> "An action or program of action directed to the care of a patient for the restoration of health or the improvement of health or the improvement or stabilization of function. Such measures usually prescribed by a medical practitioner, are designed most often to counteract disease or stimulate healing." *Churchill's Medical Dictionary*, p. 1980 (1986).
>
> "(T)he management and care of a patient for the purpose of combatting disease or disorder." *Dorland's Medical Dictionary*, p. 1746 (27th Ed. 1988).
>
> "The course of action adopted to deal with illness, and the control of the patient." *Blaketon's Gould Medical Dictionary*, p. 1740 (4th Ed. 1979).

Clearly, none of these standard definitions of "treatment" seems to countenance drugging in this context where the real goal is not health but death. As a leading law review comment pointedly noted:

> "With *Ford*, the Court approves an arrangement in which psychiatrists clear the tortured minds of capital prisoners so that the state can fill their bodies with electricity." The Supreme Court, 1985 Term-Leading Cases, 100 *Harv. L. Rev* 100, 107 (1986)

not simply preparation for a rendezvous with the electric chair.

And equally clearly, the misuse of these psychotropic drugs for purposes other than "treatment" has been a consistent problem in both the civil and criminal contexts. *See, e.g., Jones v. U.S.*, 463 U.S. 387, 103 S.Ct. 3043, 3061 (1983) (Brennan, J. dissenting):

> Administration of psychotropic medication to control behavior is common. Although this Court has never approved the practice, it is possible that an inmate will be given medication for reasons that have more to do with the needs of the institution than with individualized therapy. See *Mills v. Rogers*, 457 U.S. 291, 303, 102 S.Ct. 2442, 2450, 73 L. Ed. 2d 16 (1982); *Rennie v. Klein*, 653 F.2d 836, 845 (3rd Cir. 1981) *en banc*.

The blandness of words such as "administration" and "given" completely belies the reality of forced drugging: the physical restraints, the grappling for a demeaning position, the torn clothes, the pain of the shot and its after effects, in short, the complete violations of one's dignity and autonomy:

> According to appellant's hospital records, she "cooperated [with the] injection although it needed a show of force (5 staff members)." Appellant's declaration states that she was held down by several men who pulled down her underwear and injected her in the buttocks. *Riese*, 243 *Cal. Rptr.*, above at 244 n. 3. See also, *Harper*, 110 S.Ct. at 1046 n. 4 (Stevens, J. dissenting) (regarding Harper's reactions to Haldol)

Thus, given the setting, the purpose and the lack of any real, long term medical purpose, the forced drugging of a death row inmate is more of a "control" for institutional needs than for any real medical "treatment" to benefit the inmate.

In the most recent opinion on these very same issues, *U.S. v. Watson*, 893 F.2d 870 (8th Cir. 1990), the Eighth Circuit Court of Appeals held as follows:

> **The government argues that it is justified in forcibly medicating Holmes because the Medical Center psychologist stated that she could not recomend his release from prison unless she could treat him with psychotropic medications. We do not believe *the need to prepare Holmes for release* outweighs his right to refuse medication. ... We simply hold that if Holmes is presently functioning adequately in the prison setting and does not present a danger to himself, other inmates or prison staff, the government may not forcibly administer antipsychotropic medication. 893 F 2d at 981-2 (emphasis added)[13]**

Here there is not even the barest of assertions that Mr. Perry "needs" "treatment" from the perspective of either his danger to himself or others. See Appendix A to the Brief in Opp. Cert, at p 167.

The State's reasoning that Haldol is not being well used as a punishment in violation of the Eighth Amendment is transparently circular: "The medication is not given to the petitioner because he brutally murdered five members of his family, but is given to assist the inmate in maintaining competency." Brief in Opp, Cert, at p. iv. The missing final clause is clearly "so that he may be executed for his crimes." If execution is the only justification for the forced drugging, it fails the balancing required by *Harper*, *Bee*, *Watson*, and even *Charters*.

In short, the application of the *Harper* balancing test in this context puts Mr. Perry in the same position as Mr. Holmes in *Watson* and Mr. Bee: Once past the issue of dangerousness to himself or others, the state's interest in punishing him to the ultimate cannot by itself alone offset his "right to refuse". Mr. Perry may have had to be competent to be tried because of the state's interest in accomplishing its goal of determining whether he could be released "into the free society" as described in *Charters*, above. However, that determination being made, Mr. Perry in effect "reverts" back to the same status as a person under civil commitment for the purpose of his continuing to retain a "right to refuse". He must behave in such a way as to endanger himself, the prisoners or staff to justify being forcibly

[13] The *Watson* panel was obviously aware of the pending petition in *Harper*. See *Watson*, 893 F 2d 893 above at 977, n.12.

"treated".[14] Competence for execution or any other purely institutional need cannot balance against the very real risks of these unwanted drugs.

At no time did the trial court's hearing on Mr. Perry's competence rise to the level of due process approved by this Court in *Harper*. In fact, the trial court's "hearings" were tainted by both the *ex parte* hospital records and reports *and* the judge's interim order on August 26, 1988 unilaterally authorizing forcible drugging. See Petition, pp 5-6.

Rather than providing procedural protections on the question of forced drugging *vel non*, the hearings merely focused on the terminal issue of Mr. Perry's competency to be executed. *Harper* -- and even *Charters* -- would both seem to require more process involving the sanity commission's recommendations *ab initio* than occured here. Under the *Harper* standard, only a review by a panel of prison physicians and other professionals not currrently involved in the inmate's case could provide the necessary review. See *Harper*, 110 S.Ct. at 1040. Under *Charters*, the minimum review required seems to be only a review by a competent and appropriate professional. See *Charters*, 863 F 2d above, at 313. Here -- because of the trial court's segregation of the drug refusal issue from the process of review of competency for execution -- it is difficult to identify when and where the actual review of Mr. Perry's challenge of his forced drugging can even be said to have been considered by *any* single psychiatric professional. What appears from the record, then, is an *ad hoc*, review *in camera* of the drugging issue by a single judge tainted by dubious and unchallenged outside information. Under *Harper* -- and *Charters* -- that irregular process is insufficient to satisfy Mr. Perry's Fourteenth Amendment rights.[15] The resulting forced drugging then violates his Eighth Amendment rights by exposing him to pain and suffering from drug side effects unrelated to any legitimate treatment objective.

[14] See, on this issue, the Petition, p. 1[illegible]. La.R.S. 15: 830.1 seems to parallel precisely the reasoning in *Bee v. Greaves*, above and, more recently, in *U.S. v. Watson*, above, regarding the standard for overcoming the prisioner's right to refuse.

[15] Another standard, of course, is provided by Louisiana law, which may, of course, provide additional guarantees beyond federal constitutional guarantees. See *Mills v. Rogers*, 457 U.S. above at 300-302. While the relevant statutes do not specifically apply to the setting of a death row inmate, they clearly do provide the best available model for what process is due here. See Petition, pp. 10, 11 and 19.

C. THIS COURT'S MANDATE IN *FORD V. WAINWRIGHT* PROHIBITS THE EXECUTION OF A PERSON WHOSE SANITY FLUCTUATES FROM MOMENT TO MOMENT.

1. Factual Underpinnings

The ruling by the court below that Petitioner is sane, and therefore competent to be executed, was made despite significant factual evidence that Petitioner's mental state was in a constant state of flux. The record is replete with testimony by psychiatrists, who were well aware of Petitioner's mental illness, that Petitioner's mental state was not a constant. Indeed, one of Petitioner's psychiatrists described him as a "moving target." *See* Appendix at 79-80 (Testimony of Dr. Cox).

Indeed as Petitioner's doctors explained, Petitioner's wavering mental state was indicative of his mental illness. Petitioner was uniformly diagnosed as having schizo-affective disorder. As reflected by the expert testimony in the court below, schizo-affective disorder cannot be cured, "sometimes it will be worse or sometimes it will be better but it's going to be there." Appendix at 79 (Testimony of Dr. Cox). Thus, according to his psychiatrist, Petitioner's "competency changes frequently and he's not in the same place all the time ... (S)ometimes he's competent and sometimes he's not ... ." Appendix at 80 (Testimony of Dr. Cox). *See also* Appendix at 82-83 (Testimony of Dr. Cox); Appendix at 151-54 (medical records indicating rapid changes in Petitioner's condition).

Petitioner's case is not unusual. Many psychotic disorders cannot be miraculously "cured" and many individuals with such disorders, like Petitioner, will have mental states which vary with great frequency. Manifestations of schizophrenia, for example, "are present one day and not the next. They are revealed to one examiner and not to another ..." L. Bellak and L. Loeb, THE SCHIZOPHRENIC SYNDROME at 337-38 (1969) (*quoted in* Enzinna and Gill, *Capital Punishment and the Incompetent: Procedures for Determining Competency To Be Executed After Ford v. Wainwright*, 41 Fla. L. Rev. 115, 142 n.70 (1989) (hereinafter cited as *"Capital Punishment and the Incompetent"*)). Thus, "fluctuations in mental state ... can occur when an individual is genuinely psychotic ..." Heilbrun

and McClaren, *Assessment of Competency for Execution? A Guide for Mental Health Professionals*, 16 Bull. Am. Acad. Psychiatry and Law 205, 210 (1988) (hereinafter cited as "*Assessment of Competency for Execution?*").

Thus, this case presents one of the primary questions which was not expressly answered in *Ford v. Wainwright*, 477 U.S. 399 (1986) -- what is the substantive meaning of "insanity" to stay an execution.[16] *Amicus* contends that the Eighth and Fourteenth Amendments require, at a minimum, that the definition of insanity must be broad enough to encompass individuals whose mental state wavers constantly. To hold otherwise would permit states to engage in ghoulish "sanity watches" in order to ensure that the execution is carried out during a lucid interval.

2. *Ford* and the Meaning of Insanity

As discussed *supra*, a majority of this Court held that the Eighth Amendment, as applied to the states via the Fourteenth Amendment, prohibits a state from executing an individual who, after conviction of a capital crime, becomes "insane." 477 U.S. 399, 410 (plurality) and 418 (Powell, J., concurring). The plurality's opinion did not advance a concrete

[16] "Insanity" is, of course, a purely legal term which has been given different meanings in different stages of the criminal process. For example, the "insanity defense" precludes a person from being found guilty of a crime if, at the time of his offense, he was insane. In this context, the majority of jurisdictions have adopted the "M'Naghten" rule which will exculpate a person from criminal liability if, at the time of the offense the defendant lacked the capacity to understanding the nature and quality of the offense or, if he did have such an understanding, he did not comprehend that what he was doing was wrong. Additionally, some jurisdictions have adopted an "irresistible impulse" test which requires a verdict of not guilty by reason of insanity if the defendant has a mental disease which kept him from controlling his conduct. *See* Emanuel, Guilty But Mentally Ill Verdicts and the Death Penalty: An Eighth Amendmant Analysis, 68 *N.C. L. Rev.* 37, 42-44 (1989); Note, "Ford v. Wainwright, Statutory Changes and a New Test for Sanity: You Can't Execute Me, I'm Crazy!", 35 *Clev. St. L. Rev.* 515, 532 (1987).

Additionally, this Court had recognized that if the defendant is insane at the time of criminal proceedings, he must be committed to a mental hospital until he is mentally fit to stand trial. *Dusky v. United States*, 362 U.S. 402 (1960). In *Dusky*, the Court held that the test for competence to stand trial "'must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.'" *Id.* at 402 (quotation omitted).

definition of insanity nor propose a set of substantive guidelines to shape the state's inquiry into sanity.[17]

Justice Powell, concurring in the judgment, was the sole member of the Court to attempt to imbue the term insanity with some substantive meaning. *Id.* at 419. Jusice Powell opined that sanity to go forward with execution means that the defendant must perceive the connection between his crime and his punishment, and must be aware of his impending death. *Id.* at 422. *See State v. Martin*, 515 So. 2d 189, 190 (Fla. 1987) (*per curiam*) (applying the test enunciated by Justice Powell and concluding that person was competent to be executed despite the fact that he believed a satanic conspiracy resulted in his conviction).

3. Evolution of the *Ford* Standard in *Penry*

In *Penry v. Lynaugh*, U.S. , 109 S. Ct. 2934 (1989), this court declined to prohibit absolutely the execution of individuals with mental retardation. 109 S. Ct. at 2953-55. However, the *Penry* decision neither explicitly nor implicitly undercut the holding of *Ford*.

The evidence in the *Penry* case indicated that the defendant's IQ reflected borderline retardation and that he was capable of functioning as a 9 or 10 year old. *Id.* at 2941. The defendant contended that the Eighth and Fourteenth Amendments categorically prohibited states from executing persons with mental retardation. The Court did not accept this argument, but stressed that executions of persons who are profoundly or severely retarded would probably violate the Eighth Amendment:

[17] As Justice Marshall observed in *Ford*, no state permits the execution of persons who are insane. 477 U.S. at 408. However, the states fail to provide a uniform definition of insanity. Indeed, most states contain no explicit definition at all. *See*, Ewing, Diagnosing and Treating "Insanity" on Death Row: Legal and Ethical Perspectives, 5 *Behavioral Sciences & Law* 175, 178 (1987) (describing various standards (or lack of standards) in states); Heilbrun, The Assessment of Competency for Execution: An Overview, 5 *Behavioral Sci. & Law* 383, 388-91 (1987) (citing statutes, cases identifying state standards to be used); Note, Insanity of the Condemned, 533, 540-41 (1979) (same). The failure of the states to arrive at a consensus as to the boundaries of "insanity" for purposes of execution, does not foreclose this Court from doing so. *See Stanford v. Kentucky*, U.S. , 109 S. Ct 2969, 2981 (1989) (O'Connor, J. concurring). It has been determined that the Constitution prohibits the execution of an individual who is insane. It is the role of this Court to provide some meaning to that rule.

> The common law prohibition against punishing "idiots" for their crimes suggests that it may indeed be "cruel and unusual" punishment to execute persons who are profoundly or severely retarded and wholly lacking in the capacity to appreciate their actions. Because of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment ... *Moreover, under Ford v. Wainwright, ... someone who is "unaware of the punishment they are about to suffer and why they are to suffer it" cannot be executed. Id.* at 2954 (emphasis added).

Thus, in *Jicta*, this Court appeared to adopt Justice Powell's definition of insanity. *Amicus* contends that this standard is wholly inadequate. Moreover, even if this is the appropriate standard, *Amicus* asserts that an individual whose sanity is in a state of flux cannot be deemed competent to be executed. Indeed, it is noteworthy that *Penry* did not -- and could not given the static nature of mental retardation -- involve a situation in which the only constant in an individual's mental state is its very lack of constancy.

4. Problems With The Standard of Insanity Put Forward By Justice Powell.

Professors Hazard and Louisell have noted that "(t)he meager authority indicates that the common law test of insanity is whether the defendant is aware of the fact that he has been convicted and that he is to be executed." Hazard and Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 U.C.L.A. L. Rev. 381, 394 (hereinafter cited as *Death, the State, and the Insane*") (citing, *inter alia, Commonwealth v. Moon*, 383 Pa. 18, 117 A.2d 96 (1955)). *Accord* Case Note, *Eighth Amendment -- The Constitutional Rights of the Insane on Death Row*, 77 J. Crim. L. & Criminology 844, 863 (hereinafter cited as *"The Constitutional Rights of the Insane on Death Row"*).[18] It would appear that this test was based --

[18] This is not the sole common law definition. For example, in *Bingham v. State*, 82 Okla. Crim. 305, 169 P.2d 311, 314 (Okla. Crim. App. 1946), the court wrote that "insanity that will preclude execution means a state of general insanity, the mental powers being wholly obliterated, and a being in that deplorable condition can make no defense whatsoever and has no understanding of the nature of the punishment about to be imposed."

without much thought -- on the standard used to assess insanity at the time of trial. *Death, the State, and the Insane*, 9 UCLA L. Rev. at 394. This standard has obvious similarities to that advanced by Justice Powell in his concurrance in *Ford*.

Notably, the standard adopted by the Florida statute which was deemed procedurally invalid in *Ford* labelled a convict insane if he lacked the "mental capacity to understand the nature of the death penalty and the reason why it was imposed on him." Fla. Stat. § 922.07. Similarly, the Louisiana standard led the court below to find that the petitioner is "mentally competent for purposes of execution in that he is aware of the punishment he is about to suffer and he is aware of the reason that he is to suffer said punishment." Appendix at 62 (Order of 19th Judicial District Court, Parish of Baton Rouge). These standards are quite similar to the general common law standard identified above and the test set forth by Justice Powell.

However, there are serious problems with using this standard. Commentators have suggested that the phrase "nature of the penalty" presents problems because society has reached no agreement on what that phrase, in its broadest sense, means. Radelet and Barnard, *Ethics and the Psychiatric Determination of Competency To Be Executed*, 14 Bull. Am. Acad. Psychiatry & Law 37, 42 (1986) (hereinafter cited as *"Ethics and the Psychiatric Determination of Competency To Be Executed"*).

Moreover, the term "understand" poses even more significant problems. Two commentators have written:

> As a lower limit, the prisoner should possess a mental ability greater even than mere cognitive understanding of his or her fate. If what is meant by "understand" is mere cognitive understanding, that is, a bare mental understanding of the fact of execution and that it will result in death, then almost all mentally ill prisoners will be found competent. A superficial factual understanding rarely is impossible for a mentally ill person. *Cf.* American Psychiatric Ass'n., *Diagnostic & Statistical Manual of Mental Disorders* 191 (3d ed. 1980) ... (paranoid schizophrenics may exhibit no functional impairment and often can interact with others). What is more unusual is an impairment of of the individual's affective understanding. An individual lacking affective understanding of his impending execution could accurately describe what an execution means,

but would exhibit no emotional reaction to the knowledge that he faces execution. *Capital Punishment and the Incompetent*, 41 Fla. L. Rev. at 118 n.14.

Moreover, application of this vague standard presents many difficulties to individual mental health professionals. Indeed, the *Ford* case and that herein, provides prime examples of the difficulties of implementing these types of standards:

> The state psychiatrists who interviewed Alvin Ford illustrtate this problem. One of them, Dr. Mhatre, found that Ford exhibited an "ability to carry on day-to-day activities, and relate to his fellow inmates and guards, and appear(ed) to understand what [was] happening around him." Petition for Writ of Certiorari at 39, Ford v. Wainwright, 477 U.S. 399 (1986) (No. 85-5542). As Ford's counsel indicated, this finding fails to support the doctor's conclusion that Ford understood that he might be executed. *id.* at 39 n.29. A deluded person such as Ford, who believed that he would not be executed because he had won a "landmark case" outlawing capital punishment, see *Ford*, 477 U.S. at 403 (plurality opinion), often can operate normally on a daily basis. *See* DSM III, *supra*, at 191 (impairment in functioning may be minimal if the delusional material is not acted upon, since gross disorganization of behavior is relatively rare"). Mhatre's conclusion indicates that he understood the standard to be "does the prisoner understand anything" rather than "does the prisoner have the mental capacity to understand the nature of the dealth penalty and the reasons why it was imposed on him?"

Id.

Similarly, in this case, the court below concluded that petitioner was competent to be executed despite the fact that petitioner's psychiatrist, after numerous meetings with him, concluded that his mental state fluctuated often and rapidly. The court below relied upon the testimony of psychiatrists that, during interviews with petitioner, petitioner gave the "correct" answers to the neccessary questions. For example, Dr. Jiminez concluded that petitioner understood the reasons why he had been sentenced to death because he admitted that he had killed his family members. Appendix at 73-74. However, during the

exact same conversation, petitioner denied that he had killed his family. Simply giving the "right" answers to a few key questions once, in the context of many assessments and trial testimony which revealed that petitioner had no real understanding of what he had done or the nature of the death penalty, resulted in a finding of competence to be executed.[19]

5. Post-*Ford* Interpretations: Guilty But Mentally Ill

Twelve states have adopted pleas and verdicts of "guilty but mentally ill." Emanuel, *Guilty But Mentally Ill Verdicts and the Death Penalty: An Eighth Amendment Analysis*, 68 N.C. L. Rev. 37 (1989). These statutes provide that a defendant who is found guilty but mentally ill may receive any legally permitted sentence which a person who is not mentally ill can receive, including the death penalty. *Id.* at 38. Evidently, the purpose of these statutes is to curtail the use of the insanity defense which requires the jury to find an individual who is insane not guilty. Such persons are then committed to a mental institution until they recover their sanity. *Id.* at 39.

[19] As stressed above, there are numerous instances in which an individual might seem "sane," but such appearances are deceiving. In this context, one author has stressed:

> Experts have shown that death row confinement can have debilitating psychiatric and psychological effects on inmates. Recent evidence also suggests that many death row inmates are significantly impaired individuals, suffering from recent or unrecognized psychiatric, neurological, and cognitive disorders.
>
> *****
>
> [A] recent study on mental status of death row inmates ... found, strikingly, that every inmate studied was suffering from some type of physiologic or psychiatric disorder ... The article emphasizes that none of the subjects were obviouly schizophrenic and that it required long interviews, hospital record reviews, psychological assessments, and interviews with relatives to appreciate the nature and extent of the subjects' mental illness. The authors noted that the subjects, with one exception, attempted to minimize their psychiatric disorders, preferring to appear "bad" rather than "crazy." Note, *Ford v. Wainwright: A Coda in the Executioner's Song*, 72 Iowa L. Rev. 1461, 1478, 1479-80 (1987) (footnotes omitted).

Because of this reluctance of inmates to be stigmatized as mentally ill, there seems to be little risk that the Court will stimulate a flood of insanity claims by establishing a more meaningful standard for competency to be executed.

The highest courts of a few states have held that defendants who are found guilty but mentally ill do not fall automatically within the *Ford* prohibition on the execution of persons who are insane. *See People v. Crews*, 122 Ill. 2d 266, 522 N.E.2d 1167, 1174 (Ill. 1988); *State v. Rice*, 110 Wash. 2d 577, 757 P.2d 889, 913 (Wash. 1988) (*en banc*); *Harris v. State*, 499 N.E.2d 723, 727 (1986). These courts seem to indicate that one who is "mentally ill" is not "insane." Indeed, in *State v. Rice*, the Washington Supreme Court noted that "courts in other jurisdictions have uniformly refused to extend the prohibition against executing insane persons to those whose illness does not reach the level of insanity." 757 P.2d at 913 (collecting cases). *Cf. Lowenfeld v. Butler*, 843 F.2d 183, 188 (5th Cir. 1988) (refusing to require insanity hearing prior to execution despite affidavit of psychiatrist that defendant is a person with paranoid schizophrenia whose capacity to understand the death penalty would be impaired).

These cases indicate the inherent weakness of the courts' and common law's definitions of insanity. These definitions are wholly devoid of medical content. Thus, a defendant may be extremely disturbed, yet not be "insane."

6. A Standard for Insanity to Stay Execution

Two professors have stressed the need to develop a coherent definition for competency to be executed. In *Ethics and the Psychiatric Determination of Competency to Be Executed*, 14 Bull. Am. Acad. Psychiatry & Law at 45-47, Professors Radelet and Barnard stress that the "vagueness" and "lack of clarity" of the standard used in Florida raises significant ethical issues for psychiatrists asked to evaluate a prisioner's competency to be executed. *See also* Heilbrun and McClaren, *Assessment of Competency for Execution? A Guide for Mental Health Professionals*, 16 Bull. Am. Acad. Psychiatry & Law 205, 206-08 (1988) (evaluating ethical questions involved in determining whether to participate in assessment of competency for execution); Wallace, *Incompetency For Execution: The Supreme Court Challenges the Ethical Standards of the Mental Health Professionals*, 8 J. of Legal Medicine 265, 269-71 (1987) (indicating that it is probably unethical for psychologists and psychiatrists to evaluate a person's competency for execution

since such evaluation may enable the state to take a life); Ewing, *Diagnosing and Treating "Insanity" On Death Row: Legal and Ethical Perspectives*, 5 Behavioral Sciences & Law 175, 181-82 (1987) (same); Note, *Medical Ethics and Competency To Be Executed*, 96 Yale L. J. 167, 176-77 (1986) (evaluating ethical problems in assessing competence for execution).

Despite the lack of explicit guidance from the Court in *Ford*, a definition of insanity might be derived from examining the purposes of the prohibition on the execution of individuals who are insane. As several commentators have observed, it is helpful to examine the bases for the ban on executing persons who are insane in order to develop a contextual meaning of insanity. *See Death, the State, and the Insane*, 9 UCLA l. Rev. at 395; *The Constitutional Rights of the Insane on Death Row*, 77 J. Crim. L. & Criminology at 864.

In *Ford*, the plurality advanced various reasons for the common law and modern statutory prohibitions on the execution of individuals who are insane. 477 U.S. at 407-08. These reasons, if examined carefully, help to define the parameters of the meaning of competence to be executed. The reasons advanced in the plurality's opinion indicate, at the very least, that a person who drifts in and out of sanity and who occasionally gives the "right" answers to a few questions, is not competent to be executed.

The plurality noted that an individual who is insane cannot make his or her peace with his conscience or diety. *Id.* at 409. A person whose sanity fluctuates cannot truly accomplish this worthy goal. Similarly, if the purpose of the prohibition on execution of the insane is intended "to protect the condemned from fear and pain without comfort of understanding," *id.* at 410, the definition of insanity cannot include someone whose sanity varies. Likewise, the retributive value of executing someone whose sanity is not constant for a certain period of time is low indeed since such a person will not truly comprehend the severity of his crime and the reasons for his impending punishment. Similarly, Justice Powell's concurrence indicates that sanity means more than a passing comprehension. *See id.* at 425 n.5 (execution is stayed until a defendent is "cured" of his

disease).[20]

To permit a defendant to be executed when he does not have the type of permanent comprehension of his crime and punishment will serve no purpose whatsoever. Such a malleable definition of sanity would swallow the rule against execution of persons who are insane. States would simply be allowed to wait for a "good day" or even a lucid moment and, if the defendant can be strapped to the electric chair quickly enough, the execution can take place. This, of course, would make a mockery of the Court's decision in *Ford* and the common law rule against executions of persons who are insane.

This Court must, at the very least, set a minimum standard of competence to be executed by holding that the execution of persons, like Petitioner, whose mental state varies "like a moving target," violates the Eighth and Fourteenth Amendments.[21]

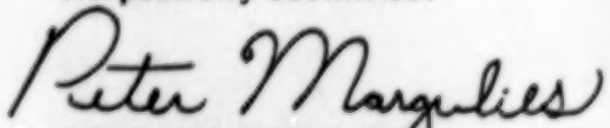
[20] Commentators have stressed the importance of a thorough long-term investigation of the defendant's competence for execution. *See Capital Punishment and the Incompetent*, 41 Fla. L. Rev. at 140-42; *Assessment of Competency for Execution?*, 16 Bull. Am. Acad. Psychiatry & law at 208-13. These arguments indicate that a quick review of the individual and the individual's answers to a few, isolated questions cannot serve as a sufficient basis upon which to deem a person competent to be executed.

[21] *Cf. Death, the State, and the Insane*, 9 UCLA L. Rev. at 395 (Professors Hazard and Louisell persuasively argue that the standard of competence for execution should be equated with the general standard used to commit persons involuntarily to an institution).

IV. CONCLUSION

On the basis of the foregoing and for the reasons stated above, *amicus curiae* respectfully requests that this Court reverse the decision below, so as to prohibit the forced drugging of the petitioner for purposes of execution and prohibit the execution of the petitioner while insane under its holding in *Ford v. Wainwright*.

Respectfully submitted.



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